Supreme Court, U.S.
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No. 00-[illegible] 001195

IN THE

Supreme Court of the United States

KENNETH SUMMERVILLE,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Eighth Circuit Court of Appeals err when it held that the findings of a union arbitration panel have collateral estoppel effect on an issue in a federal civil rights action brought pursuant to the Americans With Disabilities Act ("ADA"), when said holding directly conflicts with long-established precedent of the United States Supreme Court, specifically, *McDonald v. West Branch*, 466 U.S. 284, 292 (1984), which holds that in a federal civil rights action "a federal court should not afford res judicata or collateral-estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement?"

II. In overturning the jury's verdict, which the District Court held was supported by "ample" evidence, did the Eighth Circuit Court of Appeals err when it held, as a matter of law, that lifting was an "essential function" of Summerville's job under the ADA, and when it failed to apply the multi-factor, totality-of-the-circumstances test for determining "essential function" under the ADA contrary to the ADA regulations, case law from other circuits, and the United States Supreme Court's decision in *Reeves v. Sanderson Plumbing Prod., Inc.*, 147 L.Ed.2d 105 (2000)?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App., *infra*, 1a-7a) in *Summerville v. Trans World Airlines* is reported at 219 F.3d 855 (8th Cir. 2000). The two opinions of the District Court (App., *infra*, 21a-50a) are unreported.

JURISDICTION

The final judgment of the United States Court of Appeals for the Eighth Circuit, reversing the jury verdict and the decision of the United States District Court for the Eastern District of Missouri, was entered on August 7, 2000. App., *infra*, 1a-7a. The Court of Appeals denied a timely petition for rehearing and rehearing *en banc* on October 26, 2000. App., *infra*, 51a. This petition for writ of certiorari is filed within ninety days from that date. 28 U.S.C. §2101(c) (1994); Sup.Ct. R. 13(3). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1993).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 42 U.S.C. §12112(a) (1995): "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

2. 42 U.S.C. §12102(2) (1995): "The term 'disability' means, with respect to an individual -

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment."

3. 42 U.S.C. §12111(8) (1995): "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . ."

4. 29 C.F.R. §1630.2(n) (2000): "*Essential functions*—

(1) In general. The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs."

STATEMENT OF THE CASE

Plaintiff, Kenneth Summerville, filed a Complaint in the United States District Court for the Eastern District of Missouri alleging, in part, that Defendant, Trans World Airlines, Inc. ("TWA"), discriminated against him on the basis of his disability in violation of the Americans With Disabilities Act of 1990 ("ADA") (42 U.S.C. §12101 (1995), *et seq.*) when TWA permanently prohibited him from the privileges and benefits of working overtime, holidays, and from day trading. App., *infra*, 21a-22a, 43a-44a. In addition, Summerville filed a union grievance alleging that TWA's actions restricting these privileges and benefits also violated TWA's

collective bargaining agreement ("CBA") with his union. App., *infra*, 2a, 52a-61a. An arbitration hearing was held on the grievance and the System Board of Adjustment ("System Board"), just prior to trial, issued its arbitration decision denying Summerville's grievance. App., *infra*, 52a-61a.

The District Court held pretrial hearings on Summerville's motion *in limine* to exclude any reference at trial to the System Board arbitration decision. App., *infra*, 8a-20a. The District Court held that the arbitration decision could not be admitted into evidence at trial, finding collateral estoppel did not apply and holding that the probative value of the decision was far outweighed by its potential prejudicial effect. App., *infra*, 16a-20a.

On November 3, 1998, after a seven-day trial, the jury found in favor of Summerville on his ADA disability discrimination claim, awarding Summerville $175,000 in emotional distress damages. App., *infra*, 9a, 21a-22a. On June 11, 1999, the District Court denied TWA's Motion for Judgment as a Matter of Law and Motion for New Trial or Remittitur, finding "ample" evidence existed to support the verdict. App., *infra*, 21a, 36a n.5, 40a, 42a. On June 17, 1999, the District Court granted Summerville's Motion for Equitable and Injunctive Relief, awarding Summerville $39,081.06 in back pay. App., *infra*, 48a, 49a. The District Court also enjoined TWA from prohibiting Summerville from working overtime and holiday hours and from day trading. App., *infra*, 49a-50a. On August 7, 2000, the United States Court of Appeals for the Eighth Circuit reversed the District Court's denial of TWA's Motion for Judgment as a Matter of Law, thereby reversing the jury's verdict on Summerville's ADA disability discrimination claim, and

entering judgment as a matter of law for TWA. App., *infra*, 1a-7a.

Kenneth Summerville, a 54-year-old African American TWA employee with over 29 years of seniority, works as a Zone (also known as "Manpower") Coordinator Employee-in-Charge ("EIC"), a nonmanagement supervisory position, at TWA's St. Louis airport hub. App., *infra*, 26a-27a, 53a, 55a-56a. As a Zone Coordinator EIC, Summerville assigns 35 Customer Service Agents ("CSAs") and EIC employees their job duties for an eight-hour shift. App., *infra*, 26a. The Zone Coordinator EIC position is a desk job. App., *infra*, 2a, 26a, 57a. Prior to 1997, Summerville was an EIC supervising CSAs at several airport gates. App., *infra*, 26a. In March 1994, Summerville was injured in a car accident and was permanently restricted by his doctor from lifting more than forty pounds. App., *infra*, 2a, 26a, 38a, 56a-57a. Despite this restriction, and with TWA's knowledge, for six months after his accident, Summerville continued to work without difficulty, including work on holidays and overtime shifts. App., *infra*, 35a, 39a. In November 1994, TWA suddenly put Summerville on *permanent* "light" (also known as "limited") duty, purportedly because, according to TWA, his lifting restriction would prevent him from lifting, without assistance, wheelchair passengers into the airplane seats. App., *infra*, 35a, 39a. As an employee on permanent light duty, Summerville was banned by TWA from working overtime or holidays. App., *infra*, 35a. TWA cited a "side letter" to the collective bargaining agreement ("CBA") which prohibited employees on *temporary* light duty from working overtime and holidays. App., *infra*, 48a-49a, 53a-58a. TWA also banned Summerville from trading or exchanging work shifts with other employees (known as "day trading") based upon a com-

pany policy which prohibited employees on light duty from day trading. App., *infra*, 2a, 48a-49a, 53a-58a.

Summerville argued at trial that under the ADA lifting over 40 pounds was not an "essential function" of his EIC job, that he could perform all the "essential functions" of his job with or without a reasonable accommodation[1] and, consequently, by restricting his overtime, holiday, and day-trading benefits, TWA was discriminating against him based on his disability in violation of the ADA. App., *infra*, 21a-22a, 37a-40a. Summerville presented an abundance of evidence at trial regarding light duty and whether lifting over 40 pounds without assistance was an "essential function" of his job. The District Court found that the "[t]estimony at trial . . . indicated that other similarly situated employees, CSA's and EIC's with back problems or those who could not lift any more weight than [Summerville] - were never placed on permanent light duty." App., *infra*, 35a-36a. The District Court stated:

> Whether an employer accommodates some employees who are restricted and then attempts to strictly apply rules to others similarly situated,

[1] Under the ADA, a disabled employee must be able to perform the "essential functions" of his job with or without a reasonable accommodation. 42 U.S.C. §12111(8) (1995); 29 C.F.R. §1630.2(n) (2000); *see infra*, 1-3. Whether a particular job task is an "essential function" of the employee's job is determined by looking at a multitude of factors, including the number of employees available among whom the performance of the job function can be distributed, the amount of time spent on the job performing the function, the consequences of not requiring the employee to perform the function, the work experience of past and current employees in the job, the terms of a collective bargaining agreement, written job descriptions, and the employer's judgment as to which functions are essential. 29 C.F.R. §1630.2(n) (2000).

> denying them benefits in the process, is a relevant question in determining whether the employer engaged in intentional discrimination and whether the physical requirement, such as lifting, is a *bona fide* requirement. *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 438 (8th Cir. 1998) (construing the Pregnancy Discrimination Act under Title VII, where female pregnant employee was required to prove she could lift amount required by the CSA position, but was not required to prove her ability to lift such amount when she returned to work after giving birth).

App., *infra*, 36a n.4. The District Court noted that the facts of Summerville's case were unique because Summerville "is the only employee at TWA who has been assigned to *permanent* light duty, a status undefined in the CBA. App., *infra*, 49a n.4 (emphasis in original). The District Court further reiterated the "ample" evidence at trial supporting Summerville's claim that lifting was not an "essential function" of his job:

> At trial, testimony consistently indicated that lifting constitutes only about five percent of a CSA's job. (An EIC is considered to be a supervisor of CSA's, but in accordance with the EIC job description, should be able to perform the functions of the CSA position.) Moreover, several witnesses testified that many CSA's can not lift more than forty pounds, including those who are of small-stature or who have other physical limitations, yet they were not placed on light duty nor were they denied day-trading and holiday and overtime work privileges. Moreover, there was nothing to suggest from the testimony at trial that [Summerville] was in any way more limited than those EIC's and CSA's who

> could not lift forty pounds without assistance, but who were not placed on light duty status. There was also testimony that there are always TWA employees available to assist with such lifting. [Citations omitted.]
>
> TWA also argues that, as an EIC, [Summerville] would be required to lift wheelchair passengers into their airplane seats. There was testimony, however, that many CSA's and EIC's cannot lift passengers in this manner on their own, but that they seek assistance from other TWA employees. Moreover, most transportation and lifting of wheelchair-bound passengers is contracted to an outside firm, and does not involve TWA employees. [Citations omitted.]
>
> Finally, there was evidence that [Summerville] actually performed his EIC duties for several months without the "accommodation" of light duty. In fact, [Summerville] returned from his automobile injury in late March, 1994 and worked as an EIC with all day-trading, holiday and overtime benefits until November, 1994, when TWA management relegated him to permanent light duty . . . .

App., *infra*, 36a n.5, 38a-39a.

The evidence also revealed that many employees on temporary light duty worked overtime and holidays, and none of TWA's job descriptions for EICs specifically refer to lifting or transferring wheelchair passengers. App., *infra*, 26a-27a. There was no evidence TWA tests employees to determine if they can lift a certain number of pounds. Several witnesses, including a defense witness, testified an EIC is a supervisory position and EICs assign lifting to CSAs. App., *infra*, 26a-27a. At the

conclusion of the trial, the jury found in favor of Summerville on his ADA claim. App., *infra*, 22a, 26a-27a.

In its arbitration decision, the System Board stated that the issue before it was "[w]hether or not the Grievant, Kenneth J. Summerville, being denied the opportunity to work overtime, and holidays is proper *under the Collective Bargaining Agreement* given the facts and circumstances involved." App., *infra*, 53a (emphasis added). The System Board expressly found that, because Summerville was on "permanent" light duty and the restrictions in the CBA were only meant to apply to employees on *temporary* light duty,[2] TWA could not rely on the CBA or the "side letter" to the CBA to restrict Summerville's benefits. App., *infra*, 58a, 61a. In fact, the System Board stated that "[t]he parties did not contemplate what to do with an employee on permanent limited duty since that did not exist. Therefore, there is no specific contractual provision covering this situation." App., *infra*, 59a. But, the System Board went on to say that (1) the CBA "required" *Customer Service Agents* ("CSAs") to lift baggage and wheelchair passengers, (2) that when working overtime or holiday shifts or day-trading Summerville *might* be assigned to work as a CSA (instead of an EIC), and (3) it would not be "fair" if he could not perform *"all the functions"* he might possibly be assigned on those shifts. App., *infra*, 59a. Therefore, the System Board, overstepping its bounds, found that it was "not unreasonable" for TWA to restrict Summerville's benefits, though TWA could *not* do so based on the terms of the CBA. App., *infra*, 59a, 61a. In

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[2] Testimony at trial corroborated the fact that the CBA restrictions only applied to employees on *temporary* light duty.

its conclusion denying Summerville's grievance, the System Board stated that TWA "properly denied the Grievant, Kenneth Summerville, the opportunity to work overtime and holidays while he was on 'permanent' limited duty based on his inability to perform *all* of the functions of the *Customer Service Agent* position, however, *not* on the basis of the . . . side letter of [the CBA]." (Emphasis added.) App., *infra*, 61a.

The District Court granted Summerville's pre-trial motion *in limine* barring the admission of the System Board's arbitration decision into evidence. App., *infra*, 16a. The District Court held that, for collateral estoppel to apply, there must be an identity of issues between what was before the System Board and what was before the jury. App., *infra*, 12a, 16a-18a. There was no identity of issues, according to the District Court, because the issue before the jury was a statutory one under the ADA, namely, whether lifting is an "essential function" of Summerville's job, and the District Court held this was not the same issue before the System Board because the System Board was deciding strictly contractual CBA issues, that is, whether TWA's restrictions on Summerville were proper *under the terms of the CBA alone*. App., *infra*, 12a, 16a-20a. Therefore, the District Court held that the issues to be decided by the jury were not precluded by the System Board decision. App., *infra*, 12a, 16a-20a. The District Court additionally found that the prejudicial effect of the System Board decision outweighed its probative value and, consequently, barred its admission for that reason as well.[3] App., *infra*, 20a.

[3] Although the System Board's decision was not admitted into evidence at trial, the terms of the CBA itself as well as all of TWA's other evidence on the "essential function" issue were admitted.

At the conclusion of the trial in which the jury found that TWA had violated the ADA, TWA moved for judgment as a matter of law, arguing that any reasonable jury would find that "lifting" as described by TWA, that is, lifting over forty pounds without assistance, was an "essential function" of Summerville's position. App., *infra*, 22a, 33a, 37a-40a, 48a-49a. With respect to the collateral estoppel and preemption issue, the District Court denied TWA's post-trial motion and arguments for the same reasons it gave prior to trial on that issue. App., *infra*, 40a, 42a, 48a-49a.

With respect to the merits of the "essential function" issue, the District Court, citing ADA regulations, recognized that whether a particular job task is an "essential function" is a question of fact, which should be analyzed using a multi-factor, case-by-case approach (adding that TWA "admits" this is normally a jury question). App., *infra*, 37a-40a. Listing the evidence presented at trial on each factor, the District Court held that "[t]he question of whether [Summerville] could perform the essential functions of the position . . . and what were its essential functions, was fully vetted at the trial. There was ample testimony from which a reasonable jury could determine that lifting was not an essential function of the position." App., *infra*, 36a n.5, 38a-40a. The District Court held that "despite [his] disability, [Summerville] could perform all essential functions of his EIC position, complete with its attendant benefits of day-trading and opportunities for overtime and holiday work at a higher rate of pay," and thus denied TWA's motion for judgment as a matter of law and upheld the jury's verdict. App., *infra*, 40a, 42a.

The Eighth Circuit Court of Appeals reversed, entering judgment as a matter of law for TWA on the ADA

claim. App., *infra*, 1a, 6a. In reaching this decision, the Court of Appeals decided that the System Board made two findings: 1) the CBA "*requires*" CSAs and EICs "to lift bags and wheelchair passengers;" and 2) "on holiday, overtime, and day-trading shifts, Summerville would not *necessarily* be able to work as a zone coordinator [EIC], but would *need to be available* to work as a [CSA or an EIC at the gates]."[4] App., *infra*, 3a (emphasis added). The Court of Appeals held that collateral estoppel applied to these findings in Summerville's civil action:

> TWA contends Summerville is barred by issue preclusion from challenging the two System Board findings noted above, and that, with these findings, the district court should have granted its motion for judgment as a matter of law because Summerville cannot perform the essential functions of overtime, holiday, and day-trading employment.
>
> We agree with TWA that the System Board decision precludes Summerville from arguing about the job requirements for holiday, overtime, and day-trading shifts. We defer to the System Board's fact-finding .... Thus, the System Board's findings preclude Summerville from arguing that lifting is not required of customer service agents and employees-in-charge, and that on overtime, holiday, and day-trading shifts, Summerville is not required

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[4] This exact language is not in the System Board decision. Moreover, the System Board made no finding that lifting was an "essential function" of the CSA or EIC job, and the testimony at trial showed that Summerville would rarely, if ever, be called upon to work as a CSA because of his seniority.

> to be available to work as a customer service agent or employee-in-charge."

App., *infra*, 3a-4a.

On the issue of whether Summerville could perform the "essential functions" of his job, the Court of Appeals acknowledged that the "essential functions" of a job are the fundamental, not the marginal, duties of a job, and the "essential functions" are determined by looking at a multitude of factors set forth in the ADA and its accompanying regulations. App., *infra*, 4a. Nevertheless, the Court of Appeals ignored this multi-factor test and relied on only two of the factors, namely, whether the employer "views" a particular task as an "essential function" and whether the task is included in a comprehensive list of duties in a job description in the collective bargaining agreement. App., *infra*, 5a-6a. The Court of Appeals then solely gave credence to TWA's three pieces of evidence on these two factors. These three pieces of evidence included the two findings of the System Board which the Court of Appeals held had preclusive effect, and the third piece of evidence was that TWA "viewed" lifting as an "essential function." App., *infra*, 3a-6a. The Court of Appeals completely disregarded all the other "essential function" factors and Summerville's abundant evidence on those other factors, including that EICs rarely have to lift anything. App., *infra*, 3a-6a. Based on those two "essential function" factors alone, and ignoring all the other factors and Summerville's evidence supporting same, the Court of Appeals reversed the jury verdict and held as a *matter of law* that lifting was an "essential function" of Summerville's job. App., *infra*, 3a-6a.

ARGUMENT FOR GRANTING THE PETITION

I. Did the Eighth Circuit Court of Appeals err when it *held that the findings of* a union arbitration panel have collateral estoppel effect on an issue in a federal civil rights action brought pursuant to the Americans With Disabilities Act ("ADA"), when said holding directly conflicts with long-established precedent of the United States Supreme Court, specifically, *McDonald v. West Branch*, 466 U.S. 284, 292 (1984), which holds that in a federal civil rights action "a federal court should not afford res judicata or collateral-estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement?"

In *McDonald v. West Branch*, 466 U.S. 284, 292 (1984), this Court held that in a federal civil rights action, "a federal court should not afford res judicata or collateral-estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement." (Emphasis added.) In direct contradiction of this Court's holding in *McDonald*, the Eighth Circuit Court of Appeals in Summerville's case afforded collateral estoppel effect to an arbitration award brought pursuant to the terms of a CBA in a federal civil rights disability discrimination action.

The facts in Summerville's case and *McDonald* are virtually identical. In *McDonald*, the plaintiff filed a grievance pursuant to the collective bargaining agreement alleging his discharge from the city's police force violated the CBA. The grievance was ultimately taken to arbitration and McDonald lost, the arbitrator finding there was just cause for McDonald's discharge. *McDonald*, 466 U.S. at 285-86. Similarly, Summerville filed a grievance under his union's collective bargaining

agreement alleging the restrictions TWA placed on him violated the CBA. Summerville lost his grievance at arbitration as well. App., *infra*, 52a-61a.

McDonald did not appeal the arbitrator's decision, but he subsequently filed a civil rights action under 42 U.S.C. §1983 alleging he was not discharged for cause but, rather, for exercising his First Amendment rights, and the jury returned a verdict in McDonald's favor. *McDonald*, 466 U.S. at 286. In a similar vein, Summerville did not appeal the arbitration board's decision, he filed a civil action against TWA alleging TWA's restrictions on him violated his federal civil rights under the Americans With Disabilities Act, and the jury returned a verdict in his favor. App., *infra*, 21a-22a. In *McDonald,* the Court of Appeals for the Sixth Circuit reversed the jury's verdict, concluding McDonald's claims were barred by res judicata and collateral estoppel and, in Summerville's case, the Court of Appeals for the Eighth Circuit reversed the jury's verdict, concluding that Summerville's arguments and evidence were barred by collateral estoppel. *McDonald*, 466 U.S. at 286-87; App., *infra*, 1a-6a.

In *McDonald*, the facts before the arbitrator were similar to the facts before the jury. The *issues*, however, were different. The issue for the arbitrator was whether, under the collective bargaining agreement only, McDonald was discharged for just cause and, as such, whether the collective bargaining agreement had been violated. The issue at trial, on the other hand, was whether McDonald was discharged for exercising his First Amendment rights. This Court reversed the Court of Appeals, holding that in a federal civil rights action "a federal court should not afford res judicata or collateral-estoppel effect to an award in an arbitration proceeding

brought pursuant to the terms of a collective-bargaining agreement." *McDonald*, 466 U.S. at 292 (emphasis added); *accord Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 42-43, 49 n.10, 50, 59-60 (1974) (An employee who *unsuccessfully* claimed in arbitration his discharge was racially motivated was not foreclosed from bringing a Title VII action *based on the same facts*, with the Court holding that the "federal court should consider the employee's claim de novo," and finding that "[t]he policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of res judicata and collateral estoppel." (Emphasis added.)); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 730-34, 745 (1981) (employees who *unsuccessfully* submitted wage claims to union arbitration not precluded from bringing suit under the federal Fair Labor Standards Act *based on same facts*); *see Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 111-12, 113-14 (1991) (judicially unreviewed state administrative findings have no collateral estoppel effect on age discrimination proceedings in federal court).

As part of the basis for its holding in *McDonald*, this Court observed that an arbitrator and the union officials defending the arbitration case usually have no legal education or experience *and their focus is on the CBA alone*. *McDonald*, 466 U.S. at 290, 290 n.9, 291; *see also Gardner-Denver*, 415 U.S. at 52-55, 56-57, 52 n.16, 57 n.18. Moreover, this Court stated, "arbitral factfinding is generally not equivalent to judicial fact finding." *McDonald*, 466 U.S. at 291; *Gardner-Denver*, 415 U.S. at 57-59, 58 n.19; *Barrentine*, 450 U.S. at 744. A subsequent Supreme Court case, citing *McDonald*, held that a plaintiff's claim under the ADA was distinct from

any right conferred by the CBA and even if plaintiff were not qualified for his job (because of his disability) as the CBA requires, he would still prevail if the refusal to hire him violated the ADA. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 76, 78-79 (1998). In numerous other cases, this Court has held that an employee's rights in a union contract arbitration are separate and distinct from the employee's rights under federal law. *See Wright*, 525 U.S. at 75-76, 78-79; *Gardner-Denver*, 415 U.S. at 49-50, 52-54, 56, 60 ("Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."); *Barrentine*, 450 U.S. at 745 ("FLSA rights . . . are independent of the collective-bargaining process."); *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 559, 564-67 (1987) (conduct subject to union arbitration under a CBA pursuant to the federal Railway Labor Act does not deprive a railroad employee of his right to bring an action under the Federal Employers' Liability Act); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261-63, 266 (1994) (arbitration under a CBA pursuant to the Railway Labor Act does not preempt employee's state law whistleblower claims).

The holding of the Eighth Circuit Court of Appeals — that the System Board's arbitration findings under the CBA have collateral estoppel effect on Summerville's judicial ADA claim — is in direct conflict, and cannot be reconciled with this Court's holding in *McDonald*. The Eighth Circuit Court of Appeals clearly applied collateral estoppel effect with respect to two findings of the System Board and completely foreclosed Summerville's evidence and arguments. It is equally clear that the Court of Appeals principally relied on those two findings in reversing the jury verdict.

As in *McDonald*, the issues before the System Board in Summerville's case were different from those before the jury and court on his ADA claim. The issue before the System Board was whether TWA's restrictions on Summerville violated the CBA. In contrast, the issue before the jury and court was whether TWA's restrictions on Summerville violated the statutory provisions of the ADA. The System Board was solely looking at the CBA in deciding the issues and facts before it. The jury and court, however, were looking at the statutory requirements of the ADA in deciding the issues and facts before it. In particular, the System Board looked *only* to the job descriptions in the CBA, not the *actual* duties performed by Summerville, to determine whether lifting was part of his job. But, as required by the ADA and its implementing regulations, the jury (and the District Court) were required to determine whether unassisted lifting over 40 pounds was an "essential function" of Summerville's job. Because "essential function" is a term of art, defined by the ADA, the jury and court were required, under the law, to consider more than the job description or other terms of the collective bargaining agreement. They had to consider all the other factors set forth in the ADA, namely, the amount of time the employee spent on the job performing the function, whether other employees are available to perform the function, the consequences of not requiring the employee to perform the function, the work experience of past and current employees in the job, as well as the written job descriptions. 29 C.F.R. §1630.2(n) (2000).

The System Board paid no attention to how often Summerville actually lifted anything or whether other employees were available to assist with lifting because the System Board repeatedly states that, for its analysis

under the terms of the CBA alone, Summerville has to be able to perform *all* the requirements or parts of his job. App., *infra*, 59a-61a. Thus, even if the System Board found that lifting was *a part of, or a requirement of, or even a function of* Summerville's job under the terms of the CBA, this does *not* address the issue of whether lifting is an "*essential* function" of Summerville's job under the ADA, a law the System Board did not, and was not qualified to, consider. This "essential function" issue was never before the System Board.

In evaluating whether unassisted lifting of heavy baggage and wheelchair passengers was an "essential function" of Summerville's job, however, the jury and the District Court were required to consider *all* of the evidence on *all* of the ADA "essential function" factors. That a job description in the CBA may list the task — among many others — was just one piece of evidence.[5]

The System Board did not purport to determine which of the EIC's or CSA's many listed duties are "essential functions." Such a determination was neither relevant to the grievance proceeding nor within the System

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[5] The jury reasonably could find that the job description includes tasks that are not "essential functions." The jury could believe that an employer and union would agree to a comprehensive listing of job tasks to preclude non-disabled employees from arguing that they need not perform particular tasks because they are not within the job description. The jury could also conclude that the listing includes tasks that may be essential elsewhere but are marginal in the St. Louis hub, in light of the larger staff. *See* 29 C.F.R. Pt. 1630, App. §1630.2(n) (2000) (noting that function which may be marginal where there is a large staff may be essential where there are few employees). The jury could further note that the CBA does not address the possibility of assistance. The jury could have also found, based on all the evidence before it, that lifting was not an

Continued on next page.

Board's particular expertise. *See Gardner-Denver*, 415 U.S. at 57 (typically, arbitrator must follow CBA even if it conflicts with federal law). Rather, the only issue before the System Board was whether TWA violated the CBA by barring Summerville from day trading or from working overtime and holiday shifts. App., *infra*, 53a. The System Board reasoned that it would not be "fair" if Summerville could not perform *all* the possible duties of *any* position to which he *might* be assigned. App., *infra*, 58a-59a, 61a. Under the ADA, however, Summerville was not required to prove that he can perform *all* the possible duties of *any* position to which he might be assigned. *Cf. Wright,* 525 U.S. at 78-79 (claim asserted in ADA action "arises not out of contract, but out of the ADA, and is distinct from any right conferred by the [CBA]"); *accord Gardner-Denver*, 415 U.S. at 49-50 (Title VII); *Barrentine,* 450 U.S. at 737-38 (FLSA). Rather, the statute requires only that he be able to perform the "essential functions" of his job. 42 U.S.C. §12111(8) (1995); 29 C.F.R. §1630.2(n) (2000) ("fundamental job duties"). Because the System Board did not even consider whether lifting was an "essential function," the issues before it and the jury were not

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Footnote 5 continued.

"essential function" of *Summerville's EIC* job because the job task was listed among the CSA's job duties, not the EIC's, and because Summerville's 29 years of seniority made it extremely unlikely he would ever work as a CSA, even on overtime. Thus, the jury reasonably could find that unassisted heavy lifting is not an "essential function" of Summerville's job and, so, the limitations TWA imposed on Summerville violated the ADA, whether or not that same conduct is permissible under the CBA.

identical and the System Board's findings cannot be given preclusive or collateral estoppel effect.[6]

In numerous previous decisions, this Court has held both, that an employee is not required to submit to union arbitration his claims based on violations of state and federal law and, specifically in *McDonald*, that the determinations of an arbitration panel interpreting only a collective bargaining agreement do not have collateral estoppel effect at trial concerning an employee's federal statutory rights. *See McDonald,* 466 U.S. at 289-92; *Wright,* 525 U.S. at 75-76, 78-80, 82; *Gardner-Denver*, 415 U.S. at 49-50, 56, 60; *Barrentine*, 450 U.S. at 729-30, 745; *Atchison,* 480 U.S. at 564-67; *Hawaiian Airlines,* 512 U.S. at 252-53, 262-63, 266. Therefore, the Eighth Circuit Court of Appeals violated long-established precedent of this Court and plainly erred in giving the System Board's findings preclusive collateral estoppel effect in Summerville's ADA civil rights judicial proceeding.[7]

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[6] *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 797-98 (1999) (employee's receipt of Social Security Disability Insurance benefits does not estop or erect a strong presumption against the employee's success in an ADA claim, because the employee may qualify for such benefits but remain capable of performing the essential functions of the job).

[7] In addition to violating this Court's precedent in *McDonald*, the Court of Appeals also incorrectly applied its own definition of collateral estoppel. In the Eighth Circuit, for collateral estoppel to apply, four elements are necessary: 1) the *issue* to be concluded must be *identical* to that involved in the prior action; 2) in the prior action, the issue must have been "actually litigated;" 3) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment; and 4) the issue must have been determined by a valid and final judgment. *Haley v. Retsinas*, 138 F.3d 1245, 1248 (8th Cir. 1998). None of these

Continued on next page

II. In overturning the jury's verdict, which the District Court held was supported by "ample" evidence, did the Eighth Circuit Court of Appeals err when it held, as a matter of law, that lifting was an "essential function" of Summerville's job under the ADA, and when it failed to apply the multi-factor, totality-of-the- circumstances test for determining "essential function" under the ADA contrary to the ADA regulations, case law from other circuits, and the United States Supreme Court's decision in *Reeves v. Sanderson Plumbing Prod., Inc.*, 147 L.Ed.2d 105 (2000)?

Under the ADA, an employer may not discriminate against a "qualified individual with a disability" because of that disability with regard to an employee's compensation and other terms, conditions, and privileges of employment. 42 U.S.C. §12112(a) (1995). A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the

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Footnote 7 continued.

elements were met in Summerville's case. Under similar facts, the decision of the Court of Appeals also directly conflicts with its own previous decisions in *Fife v. Bosley*, 100 F.3d 87, 89-90 (8th Cir. 1996) ("Collateral estoppel is not appropriate when the same facts were analyzed under similar but significantly different criteria in the earlier adjudication."), and *Taggart v. Trans World Airlines, Inc.*, 40 F.3d 269, 275 (8th Cir. 1994) (union employee's state law handicap discrimination claim not preempted by Railway Labor Act).

employment position that such individual holds."[8] 42 U.S.C. §12111(8) (1995). "Essential function" is a term of art in the ADA with a specific meaning. A disabled employee is not required under the ADA to perform *all* the functions of the job, but only the "*essential* functions" of the job. "The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position." 29 C.F.R. §1630.2(n) (2000). Under the ADA, ten factors are reviewed to determine whether a particular job task is an "essential function" of the job: Whether the reason the job position exists is to perform that function; whether there are limited number of employees available among whom performance of that job function can be distributed; whether the function is highly specialized such that the employee is hired for his expertise to perform the function; the employer's judgment as to which functions are essential; written job descriptions; the amount of time spent performing the function; the consequences of not requiring the employee to perform the function; the terms of a collective bargaining agreement; the work

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[8] "Disability" means "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; . . . or (C) being regarded as having such an impairment." 42 U.S.C. §12102(2) (1995). The District Court held the evidence established Summerville met this definition of disability because he was either actually disabled or was regarded as disabled by TWA. App., *infra*, 33a-37a, 39a-40a. The Court of Appeals, though rendering no opinion on this particular issue, necessarily found the evidence sufficient to prove Summerville disabled in order for the Court of Appeals to reach its "essential function" analysis.

experience of past employees in the job, and/or; the current work experience of employees in similar jobs. 29 C.F.R. §1630.2(n)(2000); 42 U.S.C. §12111(8)(1995).

The Eighth Circuit Court of Appeals erred in holding, as a matter of law, that unassisted lifting of heavy baggage and wheelchair passengers is an "essential function" of Summerville's EIC position at TWA's St. Louis airport hub.[9] Rather than reviewing all the evidence on all of the ten "essential function" factors, the Court of Appeals relied only on TWA's evidence that supported two of those factors, namely, whether the employer "views" a particular task as an "essential function," and whether the task is included in the comprehensive list of duties in a job description in the collective bargaining agreement. The Court of Appeals completely disregarded all the other "essential function" factors and Summerville's evidence on those other factors. Based on those two factors alone, the Court of Appeals held, *as a matter of law*, that lifting was an "essential function" of Summerville's job.

The Court of Appeal's ruling cannot be reconciled with the ADA's implementing regulations and guidance nor with case law. Under the ADA regulations, the term "essential functions" means the "fundamental job duties of the employment position the [disabled individual] holds." 29 C.F.R. §1630.2(n)(1)(2000). Whether

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[9] The Court of Appeals' decision states only that "lifting" is an essential function. However, since Summerville can lift up to 40 pounds, the Court of Appeals necessarily determined that *lifting over 40 pounds* was essential. Similarly, since the Court of Appeals disregarded evidence that CSAs and EICs typically assisted one another with lifting, the Court of Appeals necessarily determined that *unassisted lifting* was essential.

a particular task is essential "is a factual determination that must be made on a case by case basis." 29 C.F.R. Pt. 1630, App. §1630.2(n) (2000). The ADA regulations list ten factors relevant to the determination of whether a particular job task is an "essential function." 29 C.F.R. §1630.2(n)(2)-(3) (2000); *see infra*, 2-3, 23-24. No single factor is dispositive, however, and "all relevant evidence should be considered." 29 C.F.R. Pt. 1630, App. §1630.2(n) (2000). In fact, Congress expressly rejected an amendment to the statute that would have created a presumption in favor of the employer's determination of "essential functions." H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 33 (1990).

Moreover, the Eighth Circuit's ruling is contrary to the holdings of other Circuit Courts of Appeal which have consistently applied a multi-factor, case-by-case approach in determining whether a particular task is an "essential function." *See Ward v. Massachusetts Health Research Inst., Inc.*, 209 F.3d 29, 34 (1st Cir. 2000); *Stone v. City of Mt. Vernon*, 118 F.3d 92, 97, 99-100 (2nd Cir. 1997); *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 147-48 (3rd Cir. 1998); *Hall v. U.S. Postal Serv.*, 857 F.2d 1073, 1079 (6th Cir. 1988) ("[d]etermination should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved"). These courts have recognized that the employer's view is *only one* of many factors to be considered. *See, e.g., Ward*, 209 F.3d at 34 (employer's "view" is "only one factor in the analysis"); *Stone*, 118 F.3d at 99-100 (employer's judgment is only one of many relevant categories of evidence); *see also Deane*, 142 F.3d at 148 ("declin[ing] to apply conclusive effect" to job description and employer's judgment of essential functions); *Hall*, 857 F.2d at 1078-80.

Reviewing all of the ten "essential function" factors, the District Court found there was "ample" evidence that unassisted lifting over 40 pounds was not an "essential function" of Summerville's EIC position at the St. Louis hub. App., *infra*, 36a n.5, 37a-40a. Specifically, the District Court noted evidence that other CSAs and EICs in the hub cannot lift more than 40 pounds without assistance; that employees there spend very little time doing heavy lifting; that, when it is necessary, other employees are always available to assist; and that, for months before TWA decided to place Summerville on limited duty, he had no difficulty doing overtime or holiday shifts. App., *infra*, 37a-39a. Accordingly, the District Court reasonably determined that TWA was not entitled to judgment as a matter of law on the ADA claim.

In reversing that decision, the Eighth Circuit Court of Appeals paid mere lip service to the uniformly accepted approach of other Circuit Courts of Appeals, completely disregarding all of Summerville's evidence. Rather, the Eighth Circuit Court of Appeals reduced the multi-factor, totality-of-the-circumstances approach to a two-factor litmus test. According to the Eighth Circuit, if the employer "views" the task as an "essential function" and it is in a comprehensive list of duties in a job description in a collective bargaining agreement, it is essential — regardless of what the other evidence shows. This *per se* approach used by the Eighth Circuit conflicts with decisions from the First, Second, Third, and Sixth Circuits. *See Deane*, 142 F.3d at 148 (holding that neither job description nor employer's judgment is conclusive); *Ward*, 209 F.3d at 34; *Stone*, 118 F.3d at 99-100; *Hall*, 857 F.2d at 1078-80. The regulations and guidance, as well as the legislative history, are likewise to the con-

trary. There is, in fact, no compelling authority for the Eighth Circuit's approach, the Eighth Circuit cites none and, thus, this Court's supervisory authority is necessary to resolve this conflict among the Circuits.

Moreover, this split among the Circuit Courts of Appeal is of national importance because, without resolution by this Court, disabled union employees in different Circuits across the United States, but under the same nation-wide collective bargaining agreement and working for the same company, will be subject to different standards and treatment under the ADA. As has been noted, the Eighth Circuit has established precedent in Summerville's case that a job description in a CBA and the employer's view of what job tasks are essential, are the only factors to be used to determine the "essential functions" of a disabled union employee's job. The First, Second, Third, and Sixth Circuits review *all* of the ADA factors, without giving greater weight to any one factor. Consequently, if this split among the Circuits is not rectified by this Court, employees in the same company, under the same circumstances, and subject to the same CBA would be treated differently under the ADA if those employees are in different Circuits and *only because* they happen to be in different Circuits. The result is that another TWA union employee working outside the Eighth Circuit under the exact same circumstances as in Summerville's case would have the benefit of the protections of the ADA while Summerville does not. The ADA is a federal law that should be evenly applied across the country. This Court's intervention in resolving this conflict among the Circuit Courts of Appeal is thus necessary to ensure fairness and even-handed application of the ADA.

The method used by the Eighth Circuit also conflicts with *Reeves v. Sanderson Plumbing Prod., Inc.*, 147 L.Ed.2d 105 (2000). In *Reeves*, the Supreme Court held that "in entertaining a motion for judgment as a matter of law [under Fed.R.Civ.P. 50], . . . the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 147 L.Ed.2d at 122. This Court, in *Reeves*, further held that the Fifth Circuit misapplied this standard of review by disregarding critical evidence favorable to plaintiff; failing to draw all reasonable inferences in favor of plaintiff; discounting plaintiff's evidence; relying on some of defendant's evidence which the Supreme Court found to be relevant but not dispositive; and impermissibly substituting its judgment for the jury's on the weight of the evidence. *Reeves*, 147 L.Ed.2d at 123.

In Summerville's case, the Eighth Circuit misapplied the standard of review on a motion under Rule 50 as established in *Reeves*, by impermissibly substituting its judgment concerning the weight of the evidence for the jury's. The determination of what is an "essential function" of a job is a question of fact for the jury, not a question of law for a Court of Appeals to determine. *See* 29 C.F.R. §1630.2(n) (2000); 29 C.F.R. Pt. 1630, App. §1630.2(n) (2000); *Ward*, 209 F.3d at 34-35, 37; *Deane*, 142 F.3d at 148; *Hall*, 857 F.2d at 1078-80; *Sharp v. Abate*, 887 F.Supp. 695, 699 (S.D.N.Y. 1995); *see generally Reeves*, 147 L.Ed.2d at 122-23. Summerville presented a wealth of evidence on the ten factors to support his position that unassisted lifting over 40 pounds was not an "essential function" of his regular job or his job on overtime, holiday, and traded shifts. The Court of Appeals acknowledged Summerville's evidence, but im-

permissibly relied on, and gave greater weight to TWA's arguments and the findings of the System Board. Contrary to *Reeves*, the Court of Appeals improperly disregarded the wealth of evidence favorable to Summerville, refused to draw all reasonable inferences in his favor, and improperly relied instead on TWA's evidence to overturn the jury verdict. Such a reweighing of the evidence is contrary to this Court's admonition and direction under *Reeves*.

The Court of Appeals also relied, in part, on *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784 (8th Cir. 1998). The Court of Appeals acknowledged that *Moritz* involved a start-up operation whereas Summerville works in TWA's St. Louis hub, where other employees can assist with heavy lifting. The Court of Appeals found this factual difference insignificant because, in its view, TWA faced "similar staffing problems." App., *infra*, 6a. This factual finding, however, impermissibly invaded the province of the jury. *See Reeves,* 147 L.Ed.2d at 122-23.[10] Since, according to the District Court, "ample" evidence supported the jury verdict, the Court of Ap-

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[10] Significant to *Moritz,* Frontier Airlines was so small other employees were not available to perform the function the disabled employee could not perform. Moreover, the *Moritz* plaintiff was a full-time CSA who had to board and deplane elderly and disabled passengers every week. Summerville, however, is an EIC who supervises the CSAs and could, as an EIC, assign lifting to CSAs to perform, and there was evidence he and other EICs performed little lifting. App., *infra*, 26a-27a, 38a-39a.

peals had no business reversing that verdict merely because it would have weighed the evidence differently.[11]

Thus, with this case, the Eighth Circuit Court of Appeals has created conflict with Supreme Court precedent, namely, *Reeves*, and among the Circuit Courts of Appeal, specifically with the First, Second, Third, and Sixth Circuits. The issue is one of national importance, and has not been previously addressed by this Court.

[11] The Court of Appeals also noted that TWA bargained for a CBA provision preventing employees on limited duty from working overtime and holidays. As the System Board expressly determined, however, that provision applies only to employees on *temporary* limited duty. App., *infra*, 58a-59a, 61a. If TWA intended the provision to extend to employees such as Summerville who are on *permanent* limited duty, it did not achieve that goal through collective bargaining.

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2992

Kenneth Summerville,
Appellee,

v.

Trans World Airlines, Inc.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: April 13, 2000

Filed: August 7, 2000

Before WOLLMAN, Chief Judge, BEAM, Circuit Judge, and FRANK,[1] District Judge.

BEAM, Circuit Judge.

The district court entered judgment against Trans World Airlines (TWA) after a jury returned a verdict for Kenneth Summerville on his claims of race and disability discrimination. TWA appeals. We affirm judgment on the race claim without further discussion, *see* 8th Cir. R. 47B, and we reverse judgment on the disability claim for the reasons detailed below.

For several years, Summerville worked for TWA as an employee-in-charge. In that position, Summerville supervised and assisted the customer service agents who

[1] The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota, sitting by designation.

work in the airport gate area. These customer service agents have several responsibilities, including coordination of the boarding and deplaning of passengers. During Summerville's employee-in-charge shifts, he would oversee four gates at a time.

In 1994, Summerville was restricted to lifting no more than forty pounds due to injuries sustained in a car accident. TWA accommodated Summerville's restriction and assigned him to limited duty. Currently, Summerville is assigned to a desk-job as a zone coordinator. In this position, Summerville oversees a large number of gates (approximately fifteen) and works with employees-in-charge to ensure gates are properly staffed with customer service agents.[2]

A collective bargaining agreement exists between TWA and its customer service agents, employees-in-charge, and zone coordinators. Under this agreement, employees on limited duty are restricted from working overtime and holidays. TWA also has a policy of restricting employees on limited duty from day-trading, which, in this context, refers to trading days of work with other employees. Summerville disagreed with TWA's decision to restrict him from working overtime and holidays, and from day-trading, so he brought a grievance under the collective bargaining agreement.

A System Board of Adjustment (System Board) was convened to arbitrate the grievance. After presentation of evidence by the parties, the System Board denied Summerville's grievance. In rendering its decision, the

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[2] Zone coordinator positions are considered employee-in-charge positions. However, to avoid confusion, when this opinion uses the term "employee-in-charge," it only refers to an employee-in-charge who oversees four gates at a time.

System Board made several factual findings, two of which are important to resolution of this case. First, the System Board determined that the collective bargaining agreement requires customer service agents and employees-in-charge to lift bags and wheelchair passengers. Second, the System Board determined that on holiday, overtime, and day-trading shifts, Summerville would not necessarily be able to work as a zone coordinator, but would need to be available to work as a customer service agent or employee-in-charge.

In addition to his grievance, Summerville also brought this action, claiming TWA engaged in unlawful disability discrimination when it barred him from working overtime and holidays, and from day-trading. To prove disability discrimination, Summerville must show he can perform the essential functions of the job. *See Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995). TWA contends Summerville is barred by issue preclusion[3] from challenging the two System Board findings noted above, and that, with these findings, the district court should have granted its motion for judgment as a matter of law because Summerville cannot perform the essential functions of overtime, holiday, and day-trading employment.

We agree with TWA that the System Board decision precludes Summerville from arguing about the job requirements for holiday, overtime, and day-trading shifts. We defer to the System Board's fact-finding because the

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[3] Under the doctrine of issue preclusion, a party is barred from relitigating an issue previously determined by a court of competent jurisdiction when the issue previously determined was necessary to the outcome of the case. *See* 18 James Wm. Moore et. al., *Moore's Federal Practice* ¶ 132.01 (3d ed. 1997).

System Board has exclusive statutory authority to decide disputes, such as Summerville's, regarding the interpretation and application of the collective bargaining agreement. *See Bowe v. Northwest Airlines, Inc.*, 974 F.2d 101, 103 (8th Cir. 1992). In addition, the traditional elements of issue preclusion are present because these fact issues are identical in both the System Board case and the present case; these fact issues were actually litigated before the System Board; resolution of these fact issues was necessary and essential to the judgment of the System Board; and the System Board's decision was a final, valid judgment. *See Haley v. Retsinas*, 138 F.3d 1245, 1248 (8th Cir. 1998) (listing factors considered in application of issue preclusion). Thus, the System Board's findings preclude Summerville from arguing that lifting is not required of customer service agents and employees-in-charge, and that on overtime, holiday, and day-trading shifts, Summerville is not required to be available to work as a customer service agent or employee-in-charge.

Having determined which facts Summerville is precluded from challenging, we now turn to the question of whether TWA is entitled to judgment as a matter of law because Summerville cannot perform an essential function of his overtime, holiday, and day-trading employment. Essential functions are the fundamental duties of a job, not activities at the margins. *See* 29 C.F.R. § 1630.2(n)(1). Essential functions are established by looking at: the employer's judgment as to what functions are essential; written job descriptions; the collective bargaining agreement; the amount of time spent on the job performing the functions; the consequences of not requiring the employee to perform the functions; and the work experience of employees in similar jobs.

See 29 C.F.R. § 1 630.2(n)(3). We review the district court's denial of TWA's motion on the essential function issue de novo. *See Douglas County Bank & Trust Co. v. United Fin. Inc.*, 207 F.3d 473, 477 (8th Cir. 2000). In making our determination, we must view the evidence presented at trial in the light most favorable to Summerville and reverse only if the evidence was insufficient to support the jury verdict. *See id.*

Summerville asserts judgment as a matter of law is inappropriate because he presented evidence that customer service agents and employees-in-charge actually performed little lifting of bags and wheelchair passengers, and, when these duties are required, other TWA employees are regularly available to perform these tasks for him. TWA counters that it views lifting wheelchair passengers and bags as an essential function of the customer service agent and employee-in-charge positions; that performing these duties is required by the collective bargaining agreement; and that on overtime, holiday, and day-trading shifts, Summerville must not only be available as a zone coordinator, but must also be available to work as a customer service agent or as an employee-in-charge.

The arguments in this case closely parallel the arguments made in *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784 (8th Cir. 1998). In *Moritz*, we affirmed the district court's grant of summary judgment to Frontier Airlines on a gate agent's disability claim because the gate agent could not perform an essential function of her job — the boarding and deplaning of elderly and disabled passengers. *See id.* at 785-88. In opposing summary judgment, the gate agent argued that assisting these passengers was not an essential function of her job because she only assisted passengers for a few minutes each week and

other employees were available to help perform this duty. *See id.* at 787. In contrast, Frontier Airlines viewed assistance of these passengers as an essential function of the gate agent position, and its employees were expected to perform a wide variety of duties, especially because Frontier Airlines was a start-up company with limited staff. *See id.*

Summerville's case is indistinguishable from *Moritz*. True, TWA generally may not encounter the same limited staffing problems as a start-up airline. But, in the situations at issue here, TWA does face similar short-staffing problems. In fact, TWA negotiated for the provision in the collective bargaining agreement that prevents employees on limited duty from working overtime and holidays because of the limited staff TWA has available on these shifts. Thus, we hold, as a matter of law, lifting is an essential function of Summerville's overtime, holiday, and day-trading employment.

Finally, Summerville could still prevail if he could perform these essential functions with a reasonable accommodation. *See Benson*, 62 F.3d at 1112. Summerville contends he can be reasonably accommodated by being allowed to work his zone coordinator job on overtime, holiday, and day-trading shifts. This argument misses the point. As noted, during these shifts, Summerville must be available to work customer service agent and employee-in-charge positions. Thus, we reject this contention, and TWA is entitled to judgment as a matter of law on Summerville's disability discrimination claim.

The district court judgment is affirmed in part and reversed in part, and we remand the case for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:96-CV-2379 MLM

KENNETH SUMMERVILLE,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC.,

and

LODGE 949 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE,
Defendants.

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE
MARY ANN L. MEDLER
UNITED STATES MAGISTRATE JUDGE

October 26, 1998
Volume I

APPEARANCES:

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Proceedings recorded by electronic recording.

[I-2]

(The following proceedings were held on October 26, 1998 in open court at 12:42 p.m.:)

THE COURT: This is the case of Kenneth Summerville versus Trans World Airlines, it is Cause No. 4:96-CV-2379 MLM.

We need to make a brief record before we go and get the venire for the selection of the jury. At our pretrial conference on Thursday last week an issue was raised regarding the arbitration award that at that time I believe was a draft. It has now been issued as a final order; is that correct? And the Court asked the parties to brief that issue. The parties did do that.

Do either of you wish to make a record in addition to your briefs? I mean, you certainly don't need to, your briefs are very thorough.

MR. BAUER: Your Honor, I would like to briefly.

THE COURT: If you may.

MR. BAUER: Also one housekeeping matter, Your Honor. There was a typographical error at the end of our brief and I've got a motion to substitute along with a corrected copy.

THE COURT: What was your typographical error? I didn't see it.

MR. BAUER: May I approach?

THE COURT: Certainly.

[I-3]

MR. BAUER: This page kind of dropped off.

THE COURT: You're right, it did drop off.

MR. BAUER: I think really all this needed was a period.

Your Honor, I'd just like to — may I address the arbitration order briefly?

THE COURT: Absolutely.

MR. BAUER: Our position is obviously that under the Railway Labor Act the only competent body to determine interpretation or application issues of the collective bargaining agreement is the System Board of Adjustment. Apparently plaintiff would like to come into the courtroom and testify that lifting is not an essential function of his job. Under federal law, under the Railway Labor Act that issue has been decided conclusively and plaintiff as a member of the union who took his arbitration at his request before the system board is bound by that decision.

We have never taken the position that an ADA claim would globally be preempted and we would have to submit that claim to arbitration. But in this case the Court in this order on the summary judgement motion found that the sole issue remaining for a determination by the fact finder was whether lifting is an essential part of plaintiff's EIC position. And the system board of adjustment has now found that indeed it is.

[I-4]

And it would be our position that that is dispositive in this case then of the ADA claim. I don't know that I need to address all the other issues. Plaintiff's counsel did mention they tried to compare the system board award to the EEOC determination. Under Title VII plaintiff is entitled to a trial de novo regardless of what the EEOC does. The system board, however, has sole jurisdiction to decide all issues of contract interpretation, contract application. And the parties are obviously bound by that determination under the Railway Labor Act.

THE COURT: Thank you. Ms. Deck, Ms. Andorfer.

MS. DECK: Well, I have a hard time finding anything in the arbitrator's decision that says lifting is an essential function of Mr. Summerville's job. It says — and I was looking for the exact line and I can't find it right this second. But it says that lifting is part of the job of a CSA, which is not the job that Mr. Summerville holds. Mr. Summerville has the job as a zone coordinator EIC where he sits at a desk all day.

And that issue about what was an essential function was never an issue that was decided or determined or debated at the arbitration hearing. The arbitration was to decide a contractual issue. And we're before the Court with a statutory issue as it relates to the ADA.

And there is nothing in the case law to indicate that [I-5] there should be collateral estoppel effect or preemptive effect given to the arbitration decision for a statutory claim under the ADA.

THE COURT: Thank you, Ms. Deck. The Court has reviewed your briefs and reviewed law of the Eighth Circuit on the collateral estoppel effect of administrative decisions and finds that in this case the arbitration award will not be admitted. And the Court finds that it does not have preclusive effect on that issue.

The primary thing is that the issue to be concluded must be identical to that involved in the prior action. And I don't find that there is an identity of issues.

The Eighth Circuit law is pretty clear that the — when they say identity they mean identity of issues. And whether or not lifting was an essential function of Mr. Summerville's job is not the issue that was decided by the collective bargaining agreement board.

The stipulated issue, and they spelled it out in the award, is whether or not the grievant was being denied the opportunity to work overtime and holidays, whether or not that was proper under the collective bargaining agreement given the facts and circumstances involved. And if not, well, what was the proper remedy.

That is not the same as deciding whether or not lifting is an essential function of the job. So it's the Court's [I-6] finding that that issue is not precluded and that is a matter of fact for the jury to find.

Is there anything else that we need to take up before we go and get the jury?

[I-21]

* * *

THE COURT: Ms. Deck, believe me, I understand what you mean, what's good for the goose is good for the gander. If one doesn't come in the other one shouldn't come in either. I'm not sure this is quite the same though. I really do not think this is quite the same. I think that —I stand by my previous ruling that this is not the identical issue.

However, to the extent that the board has ruled that in order for him to be able to work overtime, he has to be able to do the full job of a CSA, I think that — to that extent the arbitration award does come in. But it has to come in saying — comes in evidence wise, has to come in for the limited purpose of saying just what it says.

MR. BAUER: I agree.

THE COURT: And while it may not be deciding — come in as evidence of what the essential function is, it certainly comes in to — when Mr. Summerville is seeking damages for not being able to work overtime and so forth and so on, I mean, I think to that extent I think it is relevant evidence on that subject saying he's got to be able to do these things if he works overtime. We can't have a separate roster for him. He's on the EIC, CSA roster. To that [I-22] extent it comes in, he can't do the overtime.

Now, you know, maybe they'll find that he can do the day trading or whatever because they kind of dealt with it, it's in a policy, not specifically in the agreement itself. But I think to the extent that the award says what it says, it can come in as evidence of that.

* * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:96-CV-2379 MLM

KENNETH SUMMERVILLE,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC.,

and

LODGE 949 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE,
Defendants.

EXCERPT OF TRIAL TRANSCRIPT

BEFORE THE HONORABLE
MARY ANN L. MEDLER
UNITED STATES MAGISTRATE JUDGE

October 27, 1998

APPEARANCES:

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[2]

(The following proceedings were held on October 27, 1998 in open court at 8:40 a.m.:)

THE COURT: We are back on the record. Good morning by the way.

We are back on the record in the Summerville case. The jury is not present. We have some matters that we needed to take up this morning. One of the things that we wanted to take up this morning is a clarification of the — whatever I said yesterday about the arbitration award. You were right to ask for clarification, Ms. Deck, whatever I said was not clear.

Last night I did a considerable amount of research on this specific issue. I think you have both argued and briefed it sufficiently unless someone has something that they need to add this morning that is crucial that they did not add before.

To the extent yesterday that I said that the arbitration award could come in limited to what it said only, I'm going to vacate that order.

My ruling today is as follows: The arbitration award will not be admitted in the case. I will, of course, give you leave to amend your exhibit list so that you will preserve your record in that matter. But the arbitration award itself will not be admitted into evidence.

And in addition there will be no questioning about and [3] isn't it true that there was an arbitration award and so forth and so on.

I'm going to list the cases that I base this award on so that if anyone needs them they can — they'll know what to appeal me on.

And I'm not necessarily doing these in the order which I relied on them, but I tried to do them in the proper order, Supreme Court cases first.

The first Supreme Court case, most recent one is the Supreme Court versus Hawaiian Airlines, it's 512 U.S. 246, 1994. The second is also a Supreme Court case, Alexander versus Gardner-Denver, that's hyphenated Gardner-Denver, 415 U.S. 36, 1974. The third is Deneen, D-e-n-e-e-n, versus Northwest Airlines, 132 F.3d 431, Eighth Circuit 1998. The fourth is Benson versus Northwest Airlines, 62 F.3d 1108, Eighth Circuit 1995. The fourth is Bartush — I don't know how to pronounce it exactly — B-a-r-t-u-s-h, versus Northwest Airlines, 918 F.Supp 379, Middle District Florida 1996. And an additional case I found helpful is Pike versus Burlington Northern 903 P.2d 1352 Supreme Court of Montana in 1995.

Most of these cases deal with the preemptive effect of various discrimination laws, whether it be Title VII, ADA, the Pregnancy Discrimination Act on collective bargaining agreements, whether they be under the Fair Labor [4] Standards Act or the Railway Labor Act. Some of them deal specifically with the Railway Labor Act. Some of these cases deal specifically with CSAs and their relationship to the Railway Labor Act. Some of them deal specifically with collective bargaining agreements.

And in this Gardner-Denver case, although it is a Title VII case, there was a grievance filed. And following the grievance the claimant then came to court. The grievant then came to court. And the Supreme Court was clear that there was no preemptive effect. I realize that you were not discussing the — the defense in this case was not discussing preemption and not arguing even that the entire — the entire thing — the entire — you weren't arguing preemption, you were arguing issue preclusion. And believe me, I understand the distinction.

I do believe, though, the Eighth Circuit has made it extremely clear the four factors that are required for issue preclusion. And I have reread this arbitration agreement a hundred times and I do not believe that the issues that we are dealing with here are the same issues that they dealt with there. So to that extent, and believe me there's no point in beating a dead horse and me discussing it at great length because I'm sure you'll go back and reread it, and whoever needs to take it up to the Eighth Circuit feel free to do so, but I'm basing it on these cases and the [5] additional case that was cited. And I forget the name of it, Ms. Deck, but cited by you with the four factors in it.

And I will also cite to the case of Fife versus Bosley. However, I believe the case is now proceeding as Fife versus Harmon since the mayor changed. It was the case on which I was reversed. And although it's back up there now, that issue is not up there now. The issue that I was reversed on was issue preclusion. And as I said that's a rather sensitive issue for me. So toss that one into the hopper of cases upon which I relied.

Is there anything else that we need to take up?

MR. BAUER: Your Honor, can I make a quick record?

THE COURT: You certainly may.

* * *

MR. BAUER: That when the Court analyzed the ADA claim, the Court found that the only issue left for review and the only factual issue was whether lifting was an essential function of the EIC position. And we now know from, again, like I said, the only body competent to interpret the applicable section of the contract that lifting is an essential function of the job and the company's actions taken toward Mr. Summerville were in [8] accordance with that contract. So I suggest that it's clear error.

THE COURT: Okay. Thank you, Mr. Bauer.

First, I will say that the arbitration award made it clear that what they were deciding was outside the contract, that it was not covered by the collective bargaining agreement. What they said was that TWA was reasonable in what they did. But the provision, the part that they were interpreting was not in the collective bargaining agreement because there was no provision in the collective bargaining agreement for permanent light duty. So clearly that issue was not being considered.

Secondly, the courts have said repeatedly in the cases that I have cited to you that the rights protected by these statutory provisions, whether it be Title VII or the ADA, and here we're dealing with the ADA is totally separate from the rights that are protected by a collective bargaining agreement. One is statutory and one is contractual and they are different even if they result from the same factual occurrence. And that is from the Gardner-Denver case.

I realize that you are not talking about total preemption. But to the extent you're talking about issue preclusion, the same analysis applies in a different — on a slightly different tact. The case, the Deneen case versus Northwest Airlines, the most recent Eighth Circuit case, **[9]** talks specifically about CSAs and their 75-pound weight lifting requirement. Now, this is for Northwest Airlines, I realize this is not TWA. And I don't know if TWA has 75 pounds. But in any event in this Deneen case it was 75 pounds. This was done under the Pregnancy Discrimination Act. And it said that while the policy of making a CSA capable of lifting 75 pounds is not discriminatory on its face, the evidence before the jury demonstrated that it was not strictly applied across the board. That whether or not it is strictly applied across the board will be for the jury to decide in this case. There is some evidence in the depositions and so forth that it was not strictly applied across the board.

Even if lifting is not an essential function of an EIC or particularly Mr. Summerville's assignment as an EIC as a zone coordinator, it appears even from what the arbitrator has said that lifting is necessary. Whether that is the same as an essential function or not under the ADA is for the jury to decide. But it is a necessary thing that one must do if one works overtime, which is different than is an essential function of the job. So then you're into should there have been some accommodation made as to his ability to work overtime. And that's where the strict application across the board I believe will come in.

By and large that is just a further explanation of why **[10]** I'm saying the arbitration award does not come in. Bottom line is the probative value in this case is so far outweighed by the prejudice that the Court cannot permit it to come in at all. So much for the arbitration.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:96CV02379 MLM

KENNETH SUMMERVILLE,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC.,
Defendant.

MEMORANDUM AND ORDER

[Filed: June 11, 1999]

This matter is before the Court on the Defendant Trans World Airlines, Inc.'s ("TWA's") Motion for Judgment as a Matter of Law and Motion for New Trial or Remittitur [123] [133]. Plaintiff Kenneth Summerville ("Plaintiff") brought an action for damages and for injunctive, declaratory and equitable relief pursuant to 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964 (as amended) ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, the American With Disabilities Act ("ADA"), 42 U.S.C. § 12102, *et seq.*, and the Missouri Human Rights Act, Mo.Rev.Stat. § 213.010, *et seq.*, ("MHRA"). Prior to trial, Defendant IAM and Trans World Airlines ("TWA") each filed a Motion for Summary Judgment. This Court grated Defendants' motions in part, dismissing the claim for racial discrimination. The other claims, for racial harassment and disability discrimination remained in the case and were tried to a jury.

At trial, Plaintiff asserted a claim for racial harassment in the workplace by virtue of discrimination by his

supervisors and co-workers, in violation of Title VII. Plaintiff's second claim at trial was for disability discrimination, based upon Plaintiff's assertions that TWA discriminated against him in violation of the provisions of the ADA. Plaintiff also asserted a claim for disability discrimination pursuant to the Missouri Human Right Act.[1]

On November 3, 1998, a jury entered a verdict in favor of Plaintiff on all claims. TWA now moves this Court for Judgment as a Matter of Law, or, in the Alternative, for a New Trial or Remittitur. The jury awarded damages in the amount of $1.00 on Plaintiff's racial harassment claim and $175,000 on Plaintiff's ADA claim.

I.

Motion for Judgment as a Matter of Law

TWA has filed a motion for judgment as a matter of law arguing that there was insufficient evidence presented to the jury to prove either of Plaintiff's claims.

A. Standards for Judgment as a Matter of Law

The Eighth Circuit has provided clear guidance on the standard for considering whether judgment as a matter of law should be granted. "Judgment as a matter of law is proper only when the evidence is such that, without weighing the credibility of the witnesses, there is a complete absence of probative facts to support the verdict. *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 634 (8th Cir. 1998) (*citing Ryther v. KARE 11*, 108 F.3d 832, 845 (8th Cir.) (*en banc*), *cert. denied*, 65 USLW 3694, 117 S.Ct. 2510 (1997).

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[1] The parties consented to the jurisdiction of the undersigned United States Magistrate Judge for appropriate disposition pursuant to 28 U.S.C. § 636(b).

Rule 50(a)(1) of the Federal Rules of Civil Procedure provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

A court should consider the evidence "in the light most favorable to the prevailing party and must not engage in weighing or evaluation of the evidence or consider questions of credibility." *Summit v. S-B Power Tool,* 121 F.3d 416, 420 (8th Cir. 1997). In addition, to sustain a motion for judgment as a matter of law, "all the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the nonmoving party." *Summit v. S-B Power Tool,* 121 F.3d at 420-421 (*citing White v. Pence,* 961 F.2d 776, 779 (8th Cir. 1992).

In addition, courts should assume that all conflicts in the evidence were resolved in favor of the non-moving party, assume as proved all the facts the non-moving party's evidence tended to prove, and give the "benefit of all favorable inferences that may be reasonably drawn from the facts proved". *Hopper v. Hallmark Cards, Inc.,* 87 F.3d 983, 987-988 (8th Cir. 1996) (*citing First Dakota Nat'l Bank v. St. Paul Fire & Marine Ins. Con.,* 2 F.3d 801, 808 (8th Cir. 1993).

Even though the plaintiff is awarded the benefit of all reasonable inferences, he is not given 'the benefit of unreasonable inferences or those at war with the dis-

puted facts.' *St. Louis Convention & Visitors Commission v. National Football League,* 154 F.3d 851, 860 (8th Cir. 1998) (*quoting Sip-Top, Inc. v. Ekco Group, Inc.,* 86 F.3d 827, 830) (8th Cir. 1996)); *see also Hopper v. Hallmark Cards, Inc.,* 87 F.3d at 988. Moreover, to be reasonable, an inference must be able to be drawn from the evidence without resort to speculation. Id., at 988.

B. Racial Harassment

Defendant argues that JAML should be granted in favor of TWA despite the jury's verdict in favor of the Plaintiff on this claim. TWA contends that Plaintiff offered no evidence of malicious conduct, that he offered evidence of only a few meetings with different supervisors and one incident of insubordination, and that all of these incidents occurred over a period of approximately eighteen months. TWA argues, therefore, that Plaintiff failed to submit sufficient evidence, as a matter of law, to support the jury's verdict on his claim of racial harassment.

A plaintiff in a racial harassment case under Title VII must show (1) that a reasonable person would find the environment abusive or hostile; and, (2) the plaintiff subjectively believed that the environment was hostile, with actions being based upon race. *Ways v. City of Lincoln,* 871 F.2d 750 (8th Cir. 1989).

> A work environment must be dominated by racial hostility and harassment to rise to the level of a Title VII violation. *Gilbert v. City of Little Rock, Arkansas,* 722 F.2d 1390 (8th Cir. 1983). To prove a Title VII violation, an employee must establish that his or her employer has created or condoned the continuing existence of a work environment that significantly and adversely affects the psycho-

> logical well-being of an employee because of the employee's race.

Ways v. City of Lincoln, 871 F.2d at 754; *see also Wal... v. Minnesota Dept. of Corrections*, 153 F.3d 681 (8th Cir. 1998).

Courts should consider the totality of the circumstances in order to determine whether the offending conduct created an objectively hostile environment. *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888 (8th Cir. 1998). Relevant factors to assess include the frequency of the conduct, its severity, and whether the conduct unreasonably interferes with the employee's work performance. Id. Mere utterances which may cause offense are insufficient to alter the terms and conditions of employment in violation of Title VII. *Faragher v. City of Boca Raton*, 524 U.S. at ___, 118 S.Ct. at 2283. "The conduct must be sufficient to create a hostile environment, both as it would be viewed objectively by a reasonable person and as it was subjectively by the victim." *Howard v. Burns Bros.*, 149 F.3d 835, 840 (8th Cir. 1998); *see also Faragher v. City of Boca Baton*, 524 U.S. 775, ___, 118 S.Ct. 2275, 2283 (1998); *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993).

TWA contends that the encounters Plaintiff experienced in the workplace were not sufficient to rise to the level of harassment, based upon relevant case law which holds that simple teasing, offhanded comments and isolated incidents are insufficient unless they are extremely serious. *See Faragher v. City of Boca Baton*, 118 S.Ct. 2275, 2283-84 (1998); *Ways v. City of Lincoln*, 871 F.2d at 754. TWA further argues that Plaintiff must have provided "'more than a mere scintilla of evidence and may not rely on conjecture or speculation' to justify the submission of an issue to the jury." *Russo v. Baxter*

Healthcare Co., 140 F.3d 6, 7-8 (1st Cir. 1998) (*quoting Katz v. City Metal*, 87 F.3d 26, 28 (1st Cir. 1996). Indeed, TWA contends that the work environment must be "dominated" by racial hostility and harassment in order for a reasonable jury to find racial harassment and that the evidence presented in this case did not demonstrate that plaintiff's work environment was dominated by hostility and harassment.

Plaintiff asserts that the several instances which occurred between the fall of 1992 and spring of 1994 were more than enough to permit a reasonable jury to find in Plaintiff's favor in accordance with the precepts of *Faragher* and *Ways*.

Plaintiff is a 54-year-old African-American male who has been employed by TWA for over 29 years, beginning his employment in Chicago on June 2, 1969. Plaintiff transferred to Saint Louis Lambert Field as a TWA Customer Service Agent (hereinafter "CSA") on April 25, 1983 and remained employed as a CSA until 1989. Then, from 1989 until November, 1997, Plaintiff worked as an Employee In Charge (hereinafter "EIC") and was the supervisor of CSA's at gates 4 and 5 at Lambert Field. Since November, 1997, Plaintiff has been employed as a manpower coordinator EIC, with responsibility for 16 gates, assigning job duties to 35 employees for eight-hour shifts. Plaintiff has been denied benefits universally provided as part of the EIC position based upon TWA's action which placed Plaintiff on "permanent light duty" since an automobile accident left Plaintiff with some back injury.

Plaintiff is a member of the IAM union which has a collective bargaining agreement (hereinafter "CBA") with TWA. In part, that CBA provides that an EIC's

contractual duties include "assisting management where required in the leading, directing, and assigning of the work of Passenger Service Employees at the location; the duties of the basic classifications; and such other duties as may be assigned." (TWA-IAM CBA Art. 4(f).)[2]

From 1969 until 1992, Plaintiff had no complaints about his work filed against him, and TWA never reprimanded or otherwise disciplined Plaintiff. In addition, Plaintiff had never made formal complaints about discriminatory activity by TWA management. Things changed in the fall of 1992 when two separate events took place. First, Plaintiff began to meet socially with a Caucasian woman, Vicki Smith, at group roller-skating events. This relationship later developed and, by mid-1993, the couple was romantically involved. Second, Plaintiff was singled out by TWA management for two high-profile awards: he was featured in the January, 1993 issue of TWA's in-flight magazine, the Ambassador, and was featured on the cover of the TWA "Timetable" a couple of months later.

Plaintiff testified that shortly after he began his relationship with Smith, his immediate supervisor, Myra Tansil, called him into her office and raised the issue of Plaintiff seeing a married white woman and told him people were talking about them. Plaintiff testified that he told Tansil he did not care if people talked and the [sic] Tansil replied that then she would also talk about them. Tansil did not recall making this statement In mid-November, 1992, Tansil called Plaintiff for another meeting. He testified that at the outset of the meeting he inquired whether this was TWA business,

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[2] IAM was a defendant in this case, but was dismissed upon a grant of summary judgment in its favor.

that Tansil said she could make it TWA business, and that she told Plaintiff to sit down. During that meeting, Plaintiff recalls, Tansil asked Plaintiff: what do they have that we don't have? Tansil is African-American. Tansil did not recall saying this.

In the next few weeks, the Ambassador magazine came out with the article featuring Plaintiff. Just after its publication, Tansil called Plaintiff in for a third meeting and indicated that there were complaints from co-workers about Plaintiff's work, that he was not responding to requests for assistance and that he was not in his work area at the appropriate time. Tansil admitted she had no personal knowledge of Plaintiff's performance and that she had not investigated the complaints. Plaintiff then requested that Tansil repeat her information in a meeting with a union representative. This was done; Tansil did not investigate the complaints any further; and, no additional action was taken.

In the Spring of 1993, Plaintiff's face appeared on the front of TWA's "Timetable" (the flight schedule) and a co-worker found a defaced copy of the "Timetable" in the lunch-room. It had a drawing of a black stick figure with curly hair and included a written comment about black men dating white women. There was no evidence offered about who may have "authored" the defaced "Timetable."

In July, 1993, a supervisor two levels above Plaintiff, Rhonda Hamm-Niebruegge, called Plaintiff in for a meeting and indicated dozens of complaints by Plaintiff's co-workers had been lodged against him. The complaints were that Plaintiff was not in his assigned area when required to be there, not doing his job adequately, not responding to agent calls, etc. Hamm-Niebruegge

testified that she thought the complaints were probably a result of the high profile Plaintiff had at TWA that season and that these complaints were at least in part motivated by jealousy. Nevertheless, she reported these complaints to Plaintiff, who informed her that they were groundless and inquired whether any African-American workers had complained. Hamm-Niebruegge indicated that only two complaints were from African-American co-workers. She testified she did not investigate the complaints before or after her meeting with Plaintiff.

Plaintiff testified that this series of meetings where his supervisors confronted him with unsubstantiated complaints and with questions about his personal relationship with Smith left him with the feeling that they were based upon the fact that co-workers were jealous that an African-American man was getting so much attention and the fact that he was dating a white woman.

Plaintiff then filed an EEOC complaint with TWA and told the TWA representative that he felt racially harassed. TWA's Manager of Employee Relations, Roger Shields, wrote a report which included a conclusion that management had abandoned Plaintiff by passing along unsubstantiated complaints, but that he did not think management's actions were based upon race. Shields agreed with Plaintiff that management's actions ended with Plaintiff being "put on the pedestal like a duck in a shooting gallery". (Shield's Report, July 21, 1993.) After this report was issued, various management personnel met with Plaintiff. At that time Plaintiff indicated that there was racism in the workplace and offered suggestions for ways to improve the situation, including several programs available for companies to

use with employees. Plaintiff asked these managers to develop a program at TWA. Management did not develop any such program. Hamm-Niebruegge testified that she thought Plaintiff was satisfied with that meeting.

In November, 1993, another supervisor met with Plaintiff about other co-worker complaints. Plaintiff's testimony was that he demonstrated that he was not on duty at the time the alleged actions occurred.

In March 1994, Plaintiff was in an automobile accident and returned to work the last week of March. The following week, he was confronted by another supervisor, Clint Atterberry, as his shift was ending. Plaintiff and an African-American woman were waiting just outside of security to leave for the night; their shift was to end within a few minutes. Plaintiff testified that Atterberry walked past several white employees, including two who were also outside the security area, and ordered Plaintiff and his companion back to work. Plaintiff knew that an overtime crew had already been assembled and that the work for his shift was over. When Plaintiff and his companion questioned Atterberry's order and did not return immediately, Atterberry told them he would have them terminated for insubordination. Eventually, Atterberry ordered Plaintiff's termination, but Tom Gorski, Vice President of Airport Operations, determined that Plaintiff should instead be demoted for six months to a CSA position. While Plaintiff's income did not change, this action was considered a reprimand.

The issue now before the Court is whether the series of encounters with supervisors, those which passed along complaints which had not been investigated,

those that sought his termination and those which inquired into his personal life, together with smatterings of teasing from co-workers and the defaced "Timetable", are enough for a reasonable jury to find that Plaintiff was racially harassed in the workplace.

The relevant factors the jury should have considered are the frequency of the harassing behavior, its severity, and whether it interfered with the Plaintiff's work performance. *Howard v. Burn Bros.*, 149 F.3d 835, 840 (8th Cir. 1998). With regard to frequency, the Plaintiff had five or six encounters with supervisors over an eighteen-month period which were instigated by management and which involved repeated reports of unsubstantiated co-worker complaints. These meetings took place only during the time Plaintiff began to date Smith and later to receive TWA awards, and there was testimony that one supervisor, who had three separate meetings with Plaintiff, made specific references to his personal relationship with Smith and her race. TWA's own report about this series of meetings and complaints concluded that management had abandoned Plaintiff. These meetings also took place during a time when there was gossip and teasing by co-workers about Plaintiff's relationship with Smith and while Plaintiff was experiencing a high level of visibility by being honored in two TWA publications. The Atterberry encounter had the most severe ramifications and Plaintiff contended at trial that Atterberry's actions amounted to racial harassment.

In addition, there was substantial evidence at trial that Plaintiff suffered emotionally from the events at work, requiring him to have treatment for depression and to take two medical leave of absences.

Finally, the uncontested evidence before the jury was that Plaintiff had worked for TWA for nearly thirty years before these events transpired and he had never had a complaint lodged against him, nor had he lodged complaints against TWA's management. Thus, the events which took place from late 1992 through mid-1994 seem to be patently at odds with Plaintiff's prior work record and even TWA's perception of Plaintiff, given that TWA was honoring him at the same time management was calling him to meetings to share dozens of complaints from co-workers.

Under the precepts of *Faragher* and *Ways*, the Court finds that, considering all evidence in the light most favorable to the non-moving party, assuming all conflicts in the favor of that party, assuming as proved all the facts the non-moving party's evidence tended to prove, and giving the benefit of all "favorable inferences that may be reasonably drawn from the facts proved", the jury's finding on this claim was reasonable. *Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 987-988 (8th Cir. 1996) (*citing First Dakota Nat'l Bank v. St. Paul Fire and Ins. Con.*, 2 F.3d 801, 808 (8th Cir. 1993). Moreover, it is clear that there is significant evidence which is susceptible of inferences which sustain the jury's verdict. *See Summit v. S-B Power Tool*, 121 F.3d 416, 420 (8th Cir. 1997). Without weighing the credibility of evidence, there are facts on the record sufficient to support the jury's verdict. *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 634 (8th Cir. 1998); Fed.R.Civ.P. 50(a)(1). Taken together, these incidents Plaintiff presented at trial could have led a reasonable jury to conclude that racial harassment had occurred. Finally, any evidentiary margin the jury perceived may have been reflected in their award of $1.00 on this claim.

B. Disability Discrimination

TWA also contends that JAML should be granted with regard to Plaintiff's claim for disability discrimination under the ADA. TWA argues that there was insufficient evidence presented at trial to support a verdict as a matter of law because Plaintiff failed to demonstrate that he was disabled or that he could perform essential functions of his former EIC position. TWA further argues that Plaintiff failed to seek additional accommodation and that he failed to mitigate his damages as a matter of law.

In accordance with 29 C.F.R. § 1630.2(m) and 42 U.S.C. § 12111(8). A "disability" is defined as:

> (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (2) A record of such an impairment; or
>
> (3) Being regarded as having such an impairment.

29 C.F.R. § 1630.2(g). The ADA prohibits employers from discriminating against qualified individuals because of their disabilities. In addition, in order "[t]o establish a claim under the ADA, a plaintiff must show 'that he is qualified to perform the essential functions of the job, with or without reasonable accommodation and that he has suffered adverse employment action because of his disability.'" *Gutridge v. Clure*, 153 F.3d 898, 900 (8th Cir. 1998).

The parties do not agree whether Plaintiff is disabled or regarded as disabled and whether he can perform the essential functions of his EIC position with or without accommodation.

Regarded as Disabled

TWA argues that there was insufficient evidence at trial to find that Mr. Summerville was disabled and, in support of that argument, cites *Gutridge v. Clure*, 153 F.3d 898, 901 (8th Cir. 1998)[3] In *Gutridge*, the Eighth Circuit stated that a lifting restriction, without more, is insufficient to constitute a disability. In that case, however, the Eighth Circuit did not define what additional limitations or conditions would make a lifting restriction a disability. There was evidence at trial that Plaintiff has a permanent back condition, which includes bulging discs, and that he can no longer perform many daily activities he enjoyed prior to the automobile accident that caused his back injury. The jury may have found this sufficient to constitute a disability.

In addition, however, Plaintiff argued that TWA *regarded him* as disabled as defined by the ADA. Under this third prong of the ADA (42 U.S.C. § 12102(2)), an individual is "regarded as disabled" if that person is regarded by his employer as having an impairment which substantially limits a major life activity. *Miller v. City of Springfield,* 146 F.3d 612, 614 (8th Cir. 1998) (*citing Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995). The definition of a major life activity is the same whether analyzed under the first or third prong of the regulations promulgated to implement the ADA, 29 C.F.R. § 1630.2(1) (1997). The regulations include "working" as a substantial major life activity. The Eighth Circuit has determined that to find a plaintiff is sub-

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[3] In *Gutridge*, the plaintiff admitted he was unable to perform a routine function of his job: lifting and carrying computer equipment.

stantially limited in working "requires a showing that [his] overall employment opportunities are limited". Id., at 614-15 (*citing Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996). "An inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i) (1997). *See also Mastlo v. Wasau Service Corp.*, 948 F.Supp. 1396, 1415 (E.D.Mo. 1996) (Noce, J.) (the test is whether the impairment as perceived would affect the individual's ability to find work across the spectrum of same or similar jobs).

In this instance, TWA denied Plaintiff the benefits of day-trading and holiday and overtime work when it placed him on light duty — permanently. Plaintiff did not request light duty and, indeed, performed his job for several months without any accommodation. TWA argues now and presented evidence at trial that there were other jobs at TWA which Plaintiff could perform and for which he could retain his day-trade, holiday and overtime benefits. TWA's decision to relegate Plaintiff to light duty, however, precluded him from working in the entire class of CSA and EIC positions, which TWA itself deems to be a "class" of jobs. *See* TWA's Motion, at 16. Indeed, TWA relies on the fact that the CSA and EIC positions constitute an entire "class" to justify why day-trading is not an acceptable accommodation for Plaintiff.

Testimony at trial also indicated that other similarly situated employees, CSA's and EIC's with back prob-

lems or those who could not lift any more weight than Plaintiff — were never placed on permanent light duty.[4]

Plaintiff did not seek a different position; TWA determined that Plaintiff could not perform all EIC and CSA positions, that he should be placed on light duty and did so over Plaintiff's objections. TWA then created a unique EIC position for Plaintiff, but also put him on permanent light duty and denied him privileges of employment such as day-trading and overtime and holiday work. TWA barred Plaintiff from working all other EIC and CSA positions.[5]

Thus, regardless of whether Plaintiff was actually unable to perform a class of jobs at TWA, TWA treated

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[4] Whether an employer accommodates some employees who are restricted and then attempts to strictly apply rules to others similarly situated, denying them benefits in the process, is a relevant question in determining whether the employer engaged in intentional discrimination and whether the physical requirement, such as lifting, is a *bona fide* requirement. *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 438 (8th Cir. 1998) (construing the Pregnancy Discrimination Act under Title VII, where female pregnant employee was required to prove she could lift amount required by the CSA position, but was not required to prove her ability to lift such amount when she returned to work after giving birth).

[5] The question of whether he could perform the essential functions of the position he previously held, and what were its essential functions, was fully vetted at the trial. There was ample testimony from which a reasonable jury could determine that lifting was not an essential function of the position.

him as if he were.[6] A jury could have reasonably inferred that under these facts, TWA perceived Plaintiff as disabled. *See Summit v. S-B Power Tool,* 121 F.3d 416, 420 (8th Cir. 1997).

Ability to Perform the Essential Functions of the Job

Given that Plaintiff may be deemed to be "disabled" within the meaning of 29 C.F.R. §1630.2(g) and 42 U.S.C. § 12111(8), to be a qualified individual within the meaning of the statute, Plaintiff must be able to perform the job with or without accommodation. As discussed, TWA determined that Plaintiff's lifting restriction limited him from performing the entire range of CSA and EIC jobs with their attendant benefits of day-trading and opportunity to work overtime and holidays.

TWA argues that Plaintiff cannot perform the essential functions of his former position (Employee in Charge or "EIC"), yet admits that the determination of an essential function is generally a question of fact for the jury. TWA contends that judgment as a matter of law is proper here because "'there is no legally sufficient evi-

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[6] The Court takes the pertinent regulation to mean just what it says: that it is the employer's perception and not the actual condition of the plaintiff which is at issue. If a plaintiff were required to prove he is disabled under the first prong of the regulations in order to recover under the "regarded as" section, there would be virtually no distinction between these two sections. In the case now before the Court, the Plaintiff did not want to be assigned to light duty on a permanent basis and testified at trial that he could and did perform the essential functions of his former position without accommodation. *See Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (the focus is on the impairment's affect upon the attitudes of others).

dentiary basis for a reasonable jury to find for [plaintiff] on that issue". (TWA's Motion, at 5, *quoting Brickers v. Cleveland Bd. Of Education*, 145 F.3d 846, 849 (6th Cir. 1998).

Whether a function is "essential" may be deduced from whether the employer regards it as such, whether it is part of a job description, the percentage of time required to carry out that function, and the experience of employees in the same or similar positions. 29 C.F.R. § 1630.2(n).

At trial, testimony consistently indicated that lifting constitutes only about five percent of a CSA's job. (An EIC is considered to be a supervisor of CSA's, but in accordance with the EIC job description, should be able to perform the functions of the CSA position.) Moreover, several witnesses testified that many CSA's can not lift more than forty pounds, including those who are of small-stature or who have other physical limitations, yet they were not placed on light duty nor were they denied day-trading and holiday and overtime work privileges. Moreover, there was nothing to suggest from the testimony at trial that Plaintiff was in any way more limited than those EIC's and CSA's who could not lift forty pounds without assistance, but who were not placed on light duty status. There was also testimony that there are always TWA employees available to assist with such lifting. *Cf.* 29 C.F.R.. § 1630.2(n)(2)(ii) (the job function may be deemed essential because a limited number of employees are available who can perform that function); *Moritz v, Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir. 1998) (fact that Frontier was a start-up airlines with minimal staff weighed in favor

of finding certain functions essential).

TWA also argues that, as an EIC, Plaintiff would be required to lift wheelchair passengers into their airplane seats. There was testimony, however, that many CSA's and EIC's cannot lift passengers in this manner on their own, but that they seek assistance from other TWA employees. Moreover, most transportation and lifting of wheelchair-bound passengers is contracted to an outside firm, and does not involve TWA employees. *Cf. Mathews v. Trilogy Communications, Inc.*, 143 F.3d 1160, 1165 (8th Cir. 1998) (plaintiff lost his drivers' license and was uninsurable and could not perform the essential function of the position of traveling sales representative who must drive to clients' various locations).

Finally, there was evidence that Plaintiff actually performed his EIC duties for several months without the "accommodation" of light duty. In fact, Plaintiff returned from his automobile injury in late March, 1994 and worked as an EIC with all day-trading holiday and overtime benefits until November, 1994, when TWA management relegated him to permanent light duty after reviewing the results of Plaintiff's Functional Capacity Evaluation (FCE) test, a test TWA required Plaintiff to take. Only after results of that test were known did TWA place Plaintiff on light duty.[7]

The undersigned finds that a reasonable jury could

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[7] Plaintiff submitted a form from his physician upon his return to work in March, 1994, That form was in his personnel file, but TWA took no action until his lifting restriction came to the attention of manager Myra Tansil, who set the process in motion for Plaintiff's tests and eventual job restrictions.

have found that Plaintiff was disabled — or regarded as disabled by TWA — and that, despite that disability, Plaintiff could perform all essential functions of his EIC position, complete with its attendant benefits of day-trading and opportunities for overtime and holiday work at a higher rate of pay.

C. Conclusion

Having reviewed the evidence presented to the jury and having carefully read Defendant's arguments, the Court concludes that there was sufficient evidence presented for a reasonable jury to find for Plaintiff on his claim of racial harassment in the workplace and on his claim for disability discrimination. The Court therefore will deny Defendant's Motion for Judgment as a Matter of Law.

II.

Motion for a New Trial and for Remittitur

Defendant contends that, in the event judgment as a matter of law is not granted, the Court should order a new trial or, in the alternative, remittitur on the jury's award of $175,000 for emotional distress on the Plaintiff's disability claim.

New trials or amendments of judgments may be ordered pursuant to Fed.R.Civ.P. 59 to avoid a miscarriage of justice or where the verdict is contrary to the clear weight of the evidence. *Hurley v. Atlantic City Police Dept.*, 933 F.Supp 396, 423 (D.N.J. 1996) (*citing Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1100 (3rd Cir. 1995)), (cited by both the Plaintiff and Defendant). A court should not lower a damage award merely because it would have chosen to award less

money, but there must be a 'rational relationship between the specific injury sustained and the amount awarded.'" Id. (*quoting Gumbs v. Pueblo Intern, Inc.*, 823 F.2d 768,773 (3rd Cir. 1987). The Eighth Circuit has upheld a broad range compensatory damage awards for emotional distress. *See Morse v. Southern Union Company*, 1999 WL 212844 (8th Cir. (Mo.)) (award of $70,000 upheld where there was testimony from a psychologist and Plaintiff's wife that plaintiff suffered depression as a result of losing his job); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1998) ($35,000); *Kientry v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1054 (8th Cir. 1993) ($150,000); *Wilmington v. J.J. Case Co.*, 793 F.2d 909, 922 (8th Cir. 1986) ($400,000); *see also Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996) (where plaintiff was in a highly vulnerable state and walking an "economic tightrope", this was relevant in determining damages). *Cf. Delph v. Dr. Pepper Bottling Co.*, 130 F.3d 349, 357-58 (8th Cir. 1997) (where emotional complaints were vague and not intense, award was reduced from $150,000 to $50,000).

TWA seeks remittitur of the jury's award of $175,000 on Plaintiff's disability claim and argues that there was no testimony concerning Plaintiff's emotional distress as related to this claim. (TWA asserts that all emotional distress evidence related to Plaintiff's harassment claim.) This is not correct. There was testimony at trial from Plaintiff, Smith and one of Plaintiff's physicians that his assignment to permanent light duty resulted in emotional distress. Plaintiff testified that he was humiliated and embarrassed by his treatment. "A plaintiff's own testimony, along with the circumstances of a particular case, can suffice to sustain the plaintiff's burden in this regard." *Turle*, at 1215 (*citing Meyers v. City of*

Cincinnati, 14 F.3d 1115, 1119 (6th Cir. 1994)).

In addition, there were actual economic damages. Plaintiff testified that he had significant economic damages as a result of being precluded from working overtime and holiday hours at an enhanced pay-rate and that he was required to seeking credit counseling as a result. Plaintiff has been denied these benefits and has endured his current permanent light duty status for over four years. The Court finds that the amount of damages awarded by the jury is not excessive in light of the evidence presented at trial concerning Plaintiff's actual (emotional and economic) damages.

Having carefully reviewed the arguments by both Defendant TWA and Plaintiff, the Court concludes that Defendant's Motion for a New Trial or Remittitur should not be granted.

ACCORDINGLY,

IT IS HEREBY ORDERED that Defendant Trans World Airlines' Motion for Judgment As a Matter of Law or, in the Alternative, for a New Trial or Remittitur is denied. [123][133]

/s/ Mary Ann L. Medler
MARY ANN L. MEDLER
UNITED STATES
MAGISTRATE JUDGE

Dated this 11th day of June, 1999

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:96CV02379 MLM

KENNETH SUMMERVILLE,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., *et al.*,
Defendant.

MEMORANDUM AND ORDER

[Filed: June 17, 1999]

This matter is before the Court on the Motion of Plaintiff Kenneth Summerville ("Plaintiff") for Equitable and Injunctive Relief. [131] Plaintiff brought an action for damages and for injunctive, declaratory and equitable relief pursuant to 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964 (as amended) ("Title VII"), 42 U.S.C. § 2000e, *et seq.*, the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12102, *et seq.*, and the Missouri Human Rights Act, Mo. Rev, Stat. § 213.010, *et seq.*, ("MHRA").

Plaintiff's claim for racial harassment in the workplace and for disability discrimination were tried before a jury which found in favor of Plaintiff on both claims and which awarded him $1.00 on his harassment claim and $175,000 on his claim for disability discrimination.

Plaintiff now seeks equitable relief. Specifically, Plaintiff seeks an award of back pay in an amount of approximately $45,015.91, and an injunction prohibiting De-

fendant Trans World Airlines, Inc. ("TWA") from denying Plaintiff the opportunity to work overtime and holidays and to day-trade.

Courts have the power to grant equitable relief it deems appropriate in causes of action which arise under the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e, *et seq*. *Abemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). A court may order such relief as it deems appropriate to achieve the goal of making an aggrieved plaintiff whole. *Smith v. World Ins. Co.*, 38 F.3d 1456 (8th Cir. 1994).

The facts of this case have been thoroughly described in this Court's previous Order on TWA's Motion for Judgment as a Matter of Law. At this juncture, it is sufficient to say that TWA denied Plaintiff the benefits of working overtime and holidays and of day-trading because he could not lift more than forty pounds. The jury found that TWA's denial of these benefits violated the ADA by inappropriately discriminating against him on the basis of this limitation.

Overtime and Holiday Pay

Plaintiff has set forth as an exhibit to its motion detailed calculations of the overtime and holiday pay he was denied for the period of November, 1994 through 1998 as a result of this discrimination.

Plaintiff testified that he would have worked all overtime and holiday hours available to him from November 1994 through 1998. He testified that his financial situation was precarious and stressful and that he needed this additional income. Plaintiff testified that he would have worked 406 hours of overtime in 1995. He further testified that he would have worked at least that many hours in each of the following years. To calculate

the hourly rate he would have been paid, Plaintiff has provided an exhibit titled "Employee History" which sets forth his hourly wage rate for the pertinent period.

TWA contends that Plaintiff's claim for back pay is too vague and unsubstantiated. TWA points out that overtime is awarded daily, based upon immediate needs, and is given to those who sign up on an overtime roster. Time is allocated in accordance with the order employees sign that roster. TWA further asserts that Plaintiff testified he would not have worked overtime hours for Customer Service Agent ('CSA") positions, but only for Employee-in-Charge ("EIC") positions.

While Plaintiff's proof of what hours he would have worked may be slim, TWA has offered little to show why its contentions, even if true, would reduce the number of overtime hours Plaintiff would have worked. For example, TWA does not provide the Court with any information about the number of hours of overtime available for EIC positions alone, or for CSA positions alone, to support its contention that Plaintiff would not have been able to work the 406 hours per year he claims.[1]

While the Court recognizes that the exact number of hours Plaintiff would have worked is not able to be calculated exactly, it is reasonable to assume that Plaintiff's testimony regarding the hours he would have worked in 1995 is fairly accurate (Plaintiff's Exhibit 11 is his calendar for 1995 which include hand-written notations of the days he would have worked overtime),

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[1] In addition, Exhibit 90, introduced into evidence at trial, includes pay information for other EIC's. That exhibit demonstrates that there were at least 406 overtime hours available during the pertinent years.

particularly because TWA does not offer any more substantiated proof that he would not or could not have worked these hours. In addition, the Court finds that it is reasonable to assume Plaintiff would have worked a similar number of hours in each of the succeeding years through 1998.

It is uncontested that TWA pays time and a half for overtime work. Plaintiff has submitted two sets of overtime pay calculations, one of which includes a shift differential for overtime worked on higher paying shifts. The Court finds that it is too speculative to rely upon shift differentials in calculating Plaintiff's overtime pay and will use the standard one and one-half time rate for overtime hours. Based upon those numbers, Plaintiff's damages based upon missed overtime pay are as follows:.

1995 406 hours X $13.84/hour X 1.5 overtime rate =	$ 8,428.56
1996 406 hours X $14.12/hour X 1.5 overtime rate =	$ 8,599.08
1997 406 hours X $14.39/hour X 1.5 overtime rate =	$ 8,763.51
1998 406 hours X $14.55/hour X 1.5 overtime rate =	$ 8,860.95
Total Overtime for 1995-1998	$34,652.10

Plaintiff also seeks back pay for holiday hours he would have worked if TWA had permitted him to do so. TWA does not contest Plaintiff's calculations regarding holiday pay, nor does it present any argument that Plaintiff would not have worked these dates. It is also uncontested the TWA pays two and one-half times the regular pay rate for holiday work. This holiday rate should be reduced to one and one-half the regular rate because Plaintiff was paid at his regular hourly rate for holidays even though he did not work on them. Based upon Plaintiff's pay rates as set forth above, Plaintiff's holiday pay is as follows.[2]

1994 2 holidays X $13.84/hour X 1.5 holiday rate X 8 hours (one shift) =	$ 332.16
1995 6 holidays X $13.84/hour X 1.5 holiday rate X 8 hours (one shift) =	$ 996.48
1996 6 holidays X $14.12/hour X 1.5 holiday rate X 8 hours (one shift) =	$1,016.64
1997 6 holidays X $14.39/hour X 1.5 holiday rate X 8 hours (one shift) =	$1,036.08
1998 6 holidays X $14.55/hour X 1.5 holiday rate X 8 hours (one shift) =	$1,047.60
Total Holiday Pay	$4,428.96

[2] Understandably, Plaintiff has not provided the hourly rate paid to him in 1999. This motion was filed at the end of 1998. The undersigned has determined, however, that by receiving holiday pay for *all* holidays in the period of November, 1994 through 1998, his remedy is adequate without providing for 1999 holidays to date.

Thus, the Court finds that Plaintiff's missed overtime and holiday pay for the pertinent period totals $39,081.06.[3]

Injunctive Relief

Plaintiff seeks an injunction which would prohibit TWA from denying him the opportunity to work overtime and holiday hours and to day-trade without restriction. TWA contends that the collective bargaining agreement between TWA and the International Association of Machinists & Aerospace Workers, Local 949 ("IAM") as discussed in a decision of the System Board of Adjustment of October 28, 1998 (exhibit A to TWA's Response), governs whether Plaintiff should be permitted to work overtime and holidays and to day-trade. This Court fully analyzed the preemption issue in its Order on IAM's Second Motion for Summary Judgment, finding that the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.*, which bestows exclusive jurisdiction to the System Board of Adjustment for many contract disputes, does not preclude a plaintiff from seeking redress for state and federally created rights which are not dependant upon a CBA. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994); *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431 (8th Cir. 1998); *Taggart v. Trans World Airlines, Inc.*, 40 F.3d 269 (8th Cir. 1994). Moreover, the Board itself determined that Plaintiff's status at TWA —

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[3] Plaintiff has requested pre-judgment interest at a rate of seven percent (7%). Whether pre-judgment interest should be awarded is within the discretion of the Court and the undersigned is satisfied that Plaintiff has been made whole without the additional award of such interest, particularly given the relative imprecise nature of the amount of overtime hours Plaintiff would have worked had he been permitted to do so. *See, e.g. Smith v. World Ins. Co.*, 38 F.3d, at 1467.

permanent light duty — which precluded him from working overtime and holidays, was not a part of the CBA and that day-trading was also not provided for in the CBA.

The essence of Plaintiff's disability discrimination claim was that he should have been permitted to work overtime and holidays and to day-trade and the jury rendered its verdict in his favor. There is no adequate remedy at law to make Plaintiff whole and, hence, the Court finds that it is appropriate to enjoin TWA from prohibiting Plaintiff from enjoying these employment benefits.[4]

Accordingly.

IT IS HEREBY ORDERED that Plaintiff's Motion and Suggestions for Equitable and Injunctive Relief should be **GRANTED IN PART** and **DENIED IN PART**. [131]

IT IS FURTHER ORDERED that Defendant Trans World Airlines, Inc. pay damages in the amount of Thirty-Nine Thousand Eighty-One and 06/100 Dollars ($39,081.06), plus post-judgment interest at the prevailing rate until this amount is paid in full.

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[4] The facts of this case are unique, particularly because Plaintiff is the only employee at TWA who has been assigned to *permanent* light duty, a status undefined in the CBA. The Court notes that the more common situation — where employees are assigned to light duty on a temporary basis, a status defined in the CBA, and are denied the benefits of working holidays and overtime and of day-trading, also on a temporary basis — is not presently before the Court and the undersigned expresses no opinion about that provision of the CBA or its effect on employees.

IT IS FURTHER ORDERED that Defendant Trans World Airlines, Inc. shall not prohibit Plaintiff from the same opportunity to work overtime and holiday hours and to day-trade and, to do so under the same policies and procedures which apply to other employees who avail themselves of these benefits.

/s/ Mary Ann L. Medler
MARY ANN L. MEDLER
UNITED STATES
MAGISTRATE JUDGE

Dated this 17th day of June, 1999.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2992EMSL

Kenneth Summerville,
Appellee,

vs.

Trans World Airlines, Inc.,
Appellant.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-0010199)

October 26, 2000

Order Entered at the Direction of the Court

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX G

TWA/IAM SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration

between

TRANS WORLD AIRLINES, INC.

and

DISTRICT LODGE 142, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

OPINION and AWARD

Re: Claim of
Kenneth Summerville (STL)

File: TWPS/STL-28-44273

Before TWA/IAM System Board of Adjustment
Gary Poos, Union Member
J. Roger Shields, Company Member
Randall M. Kelly, Neutral Chairperson

Appearances:

For the Union:

Thomas Higginbotham	General Chairman, District Lodge 12
Kenneth H. Summerville	Grievant
Paul Schwendeman	Local Grievance Committee Chair

For the Company:

Eric A. Todd, Esq.	Attorney
John W. Good	Manager, Employee Relations
Myra Tansil Mallory	Former Manager of Customer Service
Thomas Gorski	Vice President, Airport Operations

Procedure:

A hearing in the above matter was held on August 27, 1998 at St. Louis, Missouri before the undersigned who were selected to serve as a [sic] the System Board of Adjustment pursuant to the provisions of the Collective Bargaining Agreement between the Company and the Union and the procedures of the Railway Labor Act. At this hearing, all parties were given full opportunity to present their evidence, testimony and argument. None of the parties wishing to file briefs, the record and hearing were closed at the close of oral argument that same day. The Board met in executive session subsequently.

Stipulated Issue:

Whether or not the Grievant, Kenneth J. Summerville, being denied the opportunity to work overtime, and holidays is proper under the Collective Bargaining Agreement given the facts and circumstances involved? If not, what shall be the remedy?

In addition to the stipulated issue before the Board, the Union has taken the position that denial of day trading is included in the issue. The Company asserts that day trades are a Company provided privilege outside the contract and cannot be addressed by the Board.

Background Facts and Circumstances of the Dispute:

The Grievant, Kenneth J. Summerville, is employed as an Employee in Charge in the St. Louis base. He has worked for the Company since 1969 and has been an EIC for the last eight years. As EIC, he functions as a Zone Coordinator in St. Louis.

In March, 1994, he was involved in a car accident resulting in an injury to his back (U. Exh. 1). On September 1, 1994, his physician returned him to work with permanent lifting restrictions. On November 9, 1994, the Company acknowledged his restrictions and simultaneously applied the terms of the side letter of agreement between the parties set forth on page 128 of the contract. This side letter provides that employees on temporary limited duty are barred from working overtime or holidays. In addition, the Company informed him that he was not eligible to engage in day trades with other employees pursuant to Company policy.

The Grievant filed a timely protest of these restrictions and the Union pursued the matter through the contractual procedure (Jt. Exh. 2). The matter not being resolved, it is properly before the Board of Adjustment for final and binding arbitration pursuant to the terms of the Collective Bargaining Agreement between the parties and the Railway Labor Act.

Cited Contractual Provisions:

Side Letter page 128 dated April 1, 1992

> This will confirm our understanding reached during negotiations concerning Limited Duty.
>
> 1. An employee returning from illness or injury may be given limited duty assignment providing such limited duty assignment is available in his classification and on his bid shift. . .
>
> 2. Limited duty assignments shall be for a period of up to ninety (90) days. By mutual agreement between the local management and the IAM Grievance Committee (except MCI - Relief Com-

mittee), such assignment may be extended in up to thirty (30) day increments.

3. Employees on limited duty assignments will not be eligible to work overtime during such assignments.

4. Employees on limited duty will observe all holidays.

5. Limited duty assignments will be made based on the employee's ability to perform work.

6. The local IAM Grievance Committee shall be advised in advance of any employee being assigned to limited duty.

Cited St. Louis Station Policy

Following are the shift/day trade procedures that will be effective immediately [January 25, 1993].

4. Employees on limited duty status may not participate in a shift or day trade.

* * - *

13. Employees involved in a shift/day trade MUST be able to perform all of the duties of the employee with whom they are trading.

Trading is a privilege that TWA is pleased to offer in order to increase your work schedule flexibility....

OPINION

The Grievant is a long term employee and a good one (See, for example, U. Exh. 2). At one point, he was employed in a management position as a Manpower

Coordinator in St. Louis. When that position was eliminated, he went back into the collective bargaining unit as Customer Service Employee in Charge (a lead Customer Service Agent) in St. Louis eight years ago. He is now an EIC, functioning as a Zone Coordinator in St. Louis. This is a job that he can perform within his restrictions.

In March, 1994, he was involved in a car accident resulting in an injury to his knee, shoulder and back, the back injury being the most significant (U. Exh. 1). He continued working with lifting restrictions, i.e., no more than 25 pounds (U. Exh. 1, pp. 1-2). On June 23, 1994, his physician returned him to work with permanent lifting restrictions., i.e., no more than 30 pounds (U, Exh. 1, p. 3; Co. Exhs. 3-5). The restrictions were submitted to the Company on September 1, 1994, retroactive to June 23 (U. Exh. 1, pp 4-5). However, for some reason, his physician returned him to full duty without restrictions on September 14 (Co. Exh. 6). On October 28, 1994, the Grievant's physician returned him to "full duty" with the permanent lifting restriction (U. Exh. 1, p. 6; Co. Exh. 7).

On November 3 and 7, 1994, management informed the Grievant that, because he was on limited duty, his shift and day trade privileges were restricted. The Grievant declined to sign the form acknowledging this and management imposed the restriction on November 9, 1994 (U. Exh. 1, pp. 7-8; Co. Exh. 11). The Grievant signed the acknowledgment that he was unable to engage in day or shift trades during his light duty status (the parties agreed that light and limited duty are interchangeable), "whether it is temporary or permanent" (Co. Exh. 12). Although not documented, the Company restricted the Grievant from working overtime and holidays at the same time.

A Functional Capacity Examination conducted by an outside physical therapist in late November, 1994 found the following:

> At this point, based on the 3 1/2 hour evaluation it is felt Mr. Summerville could return to work in his usual and customary employment in customer service for TWA with the restriction of no passenger transfers secondary to demonstrated difficulty with job simulated tasks and lifting 40 lbs. during the FCE (U. Exh, 3, pp. 9-18; Co. Exh. 9).

The additional restriction of no passenger transfers was reported to the station on November 17, 1994 (U. Exh. 1, p. 19; Co. Exh. 10). The restrictions are still in effect (U. Exh. 1, pp. 20-25).

The instant grievance was filed on January 3, 1995.

There is no need to review all the Grievant's job functions in light of his restrictions. Suffice it to say that his current job as Zone Coordinator is a sedentary job that requires no lifting or passenger transfers in the regular course and when such duties might be required, there are others available during his day shift to do them. In this respect, the Grievant's position is perhaps unique among bargaining unit positions at the Company. St. Louis is the largest station; as such, it needs a Zone Coordinator and is able to use one full-time. At other stations, Zone Coordinator is not a full-time position, but is part of an EIC's duties; duties that include boarding and meeting flights which could lead to lifting and passenger transfers. Because of this unique position, the Grievant is able to work full-time with his permanent restrictions.

In fact, Vice President Gorski testified without rebuttal that there is no such thing as permanent limited duty. Manager of Employee Relations John Good testified that the Grievant is in a unique position being able to continue working indefinitely with restrictions.

Contractually, the first issue is whether the April 10, 1992 side letter applies to the Grievant. Even a cursory reading of the side letter makes it clear that it is intended to apply to short term limited duty while an employee recovers from an injury or illness before going back to full duty. This is emphasized by the fact that the Company never approached the Local Grievance Committee to agree to an extension to the Grievant's limited duty status (although it must be pointed out that the Union never raised this as a reason not to place the Grievant on permanent limited duty). At most, the side letter can be used to restrict the Grievant from working overtime and holidays for the first ninety days.

Thereafter, the Grievant's situation was not covered by the side letter since he now had permanent restrictions. The Company cannot restrict the Grievant from working overtime or holidays on the basis of the side letter after the first ninety days without obtaining agreement from the Union to extend the status.

However, as explained in the hearing, the underlying purpose of the side letter was to avoid a situation where an employee on limited duty was forced to perform work outside his or her restrictions. As explained, the Company can structure a position for a limited duty employee within a specific shift and location, but cannot ensure that the employee will not be required to do additional or different duties in an overtime or holiday situation. For example, the Grievant can clearly work

his regular position as Zone Coordinator on the day shift without lifting or transferring passengers. However, he is on the EIC and Customer Service Agent overtime rosters for overtime. This means that if he works overtime, he can be assigned to any Customer Service Agent duties (see Article 4(f) of the contract) which include lifting baggage and transferring passengers, duties outside his restrictions. As Gorski explained, the Company simply cannot be in the position of having a limited duty employee working in a position where he or she cannot perform all the functions of the positions — that this would not be fair to the employee or the Company and could result in injury to the employee and liability for the Company.

This leads to the question whether the Company could restrict the Grievant from working overtime and holidays without relying on the side letter. The side letter only applies to temporary limited duty. The parties did not contemplate what to do with an employee on permanent limited duty since that did not exist. Therefore, there is no specific contractual provision covering this situation.

The problem is how to accommodate the Grievant's restrictions with the existing overtime rosters. It is conceivable that the Grievant could work specific overtime in specific EIC positions. He could not work overtime in CSA positions with his restrictions. The problem is that there is no way of establishing an overtime list only for the Grievant. In this situation, it was not unreasonable for the Company to restrict the Grievant from working overtime. Indeed, it appears to be the only viable option for ensuring that the Grievant is not required to work outside his restrictions while at the same time ensuring that the Company has capable

employees performing CSA duties. The Board cannot say that it was a violation of the contract for the Company to restrict the Grievant from working overtime.

As to holidays, the same analysis applies. Holiday staffing is typically less than on regular days and there is no assurance that the Grievant might not be required to perform duties outside his restrictions on a holiday.

Finally, as to the restriction on the Grievant's day and shift trading privileges, this is an extra contractual privilege with explicit terms. One of those terms is that employee on limited duty, whether temporary or permanent, are restricted from such trades. The Grievant even signed his acknowledgment that he was restricted under this policy. The reasons are the same as discussed above. Whether it is because this is beyond the jurisdiction of the Board to consider or whether the Grievant was treated uniformly under the policy, the grievance over this claim must be denied.

On final note, the Grievant has the ability to bid into a position (for example, in Load Control) where he can perform all of the duties of the job classification and could not be restricted from working overtime or holidays or engaging in day or shift trades. In essence, the Grievant has chosen to stay in a position he likes but within a job classification (CSA) that requires work outside of his restrictions,

AWARD

We, the undersigned members of the TWA/IAM System Board of Adjustment, to whom was submitted a certain issue between the parties hereto, having duly heard the proofs and allegations and after due consideration, do hereby award as follows:

1. That for reasons set forth herein, based on all the facts and circumstances, the Company properly denied the Grievant, Kenneth Summerville, the opportunity to work overtime and holidays during the first ninety days he was on limited duty based on the April 10, 1992 side letter of agreement;

2. That the Company properly denied the Grievant, Kenneth Summerville, the opportunity to work overtime and holidays while he was on "permanent" limited duty based on his inability to perform all of the functions of the Customer Service Agent position, however, not on the basis of the April 10, 1992 side letter of agreement;

3. That the Company properly restricted the Grievant from engaging in day or shift trades on the basis of the Company policy; and

4. The grievance is denied.

Signed this 23rd day of October, 1998.

/s/ Randall M. Kelly
Randall M. Kelly
Neutral Chairperson

/s/ J. Roger Shields
J Roger Shields
Company Member
Concur/Dissent

/s/ Gary Poos
Gary Poos
Union Member
Concur/Dissent

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(2)

No. 00-1195

IN THE

Supreme Court of the United States

KENNETH SUMMERVILLE,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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30 pp

QUESTIONS PRESENTED

I. Whether, under the facts of this case, issue preclusion bars Summerville from arguing about the job requirements for TWA's overtime, holiday and day-trading employment where a System Board of Adjustment has conclusively found that (1) lifting is a requirement of such employment for customer service agents and employees in charge, and (2) Summerville must be available to perform any function of these positions during such employment, a determination that was made within the System Board's exclusive statutory jurisdiction to decide disputes regarding the interpretation and application of the collective bargaining agreement pursuant to the Railway Labor Act, 45 U.S.C. § 184.

II. Whether, in light of the System Board's final and binding determination, judgment as a matter of law for TWA on Summerville's disability discrimination claim was proper because lifting is an essential function of Summerville's overtime, holiday and day-trading employment, and Summerville cannot perform an essential function of such employment with or without reasonable accommodation.

PARTIES

PETITIONER: Kenneth Summerville

RESPONDENT: Trans World Airlines, Inc.

Trans World Airlines, Inc. has no parent corporations or non-wholly owned subsidiaries. Sup. Ct. R. 29.6.

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STATUTORY PROVISIONS

Statutory provisions at issue, in addition to those provided by Summerville, include:

1. **45 U.S.C. § 151a: General Purposes.** The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

2. **45 U.S.C. § 184: System, group, or regional boards of adjustment.** The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, ... shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the

disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Trans World Airlines, Inc. ("TWA") files this Brief in Opposition to the Petition for a Writ of Certiorari and would respectfully show as follows:

STATEMENT OF THE CASE

Kenneth Summerville was employed by TWA in 1969. (Petitioner's Appendix ("App.") 26.) He became an Employee in Charge ("EIC") at Lambert Field in St. Louis in 1989. (App. 26.) In that position, Summerville supervised and assisted Customer Service Agents ("CSA") who worked in the airport gate areas to coordinate boarding and deplaning of passengers, including those in wheelchairs, among other duties. For approximately nine (9) months in 1991-92, Summerville served in a management position as Manpower Coordinator, to which he was promoted by TWA; but after that job was eliminated, Summerville returned to his gate EIC position. (App. 26, 55-56.)

Summerville is a bargaining unit member of the International Association of Machinists & Aerospace Workers, AFL-CIO ("IAM"). (App. 26.) Summerville's employment, as a result, is subject to the TWA-IAM collective bargaining agreement ("CBA"), as well as TWA's Management Policy and Procedure Manual ("MPPM"). (App. 2, 26-27, 55.) The contractual duties of an EIC, as set out in the CBA, are: "assisting management where required in the leading, directing, and assigning of the work of Passenger Service Employees at the location; *the duties of the basic classification [CSA]; and such other duties as may be assigned.*" (App. 26-27.) (emphasis added). The contractual duties of a CSA, in pertinent part, are: "*checking-in passengers*

and baggage; insuring the expeditious flow of passengers through the terminal and gate areas; and performing passenger boarding functions." (App. 2, 59.) (emphasis added). Thus, by contract, the duties of an EIC include all CSA duties plus additional duties. (App. 38.)

In 1994, due to back injuries sustained in an automobile accident, Summerville was limited by his doctor to lifting no more than forty (40) pounds. (App. 2.) TWA accommodated Summerville by observing his lifting restrictions and assigning him to limited duty as a gate EIC. (App. 2.) Subsequently, TWA also accommodated Summerville by assigning him on his regular shift to a desk job as a Zone Coordinator EIC, which requires no lifting. (App. 2.) He chose not to use his seniority to bid into a different job classification that did not include lifting. (App. 60.)

The CBA further provides that "[e]mployees on limited duty assignment will not be eligible to work overtime during such assignments," and that "[e]mployees on limited duty assignment will observe all holidays." (App. 2, 54-55.) Finally, MPPM Section 10.71.01 provides employees working in a limited duty capacity are restricted from day trading. (App. 2, 55.) These provisions were agreed to by the IAM on behalf of its employee members.

Despite these applicable contract provisions, Summerville disagreed with TWA's action to restrict him from working overtime, holiday and day-trading shifts, so he brought a grievance under the CBA. (App. 2, 54.) Summerville argued that lifting was not a requirement of his position as an EIC either on his regular shift *or* on overtime, holiday and day-trading shifts (because he had sufficient seniority to avoid jobs that require

lifting) and, therefore, that he should be permitted to work such shifts. (App. 5, 38-39.) A TWA-IAM System Board of Adjustment ("System Board") was convened under the CBA and the Railway Labor Act ("RLA") to arbitrate Summerville's grievance. (App. 2, 10, 52-53.) The System Board's determination, pursuant to the CBA and the RLA, is final and binding on the parties. (App. 2, 4, 53-54.) Following the presentation of evidence and testimony by both parties and their witnesses on August 27, 1998, the System Board denied Summerville's grievance. (App. 53, 61.)

The System Board made several factual findings in rendering its decision. The Board determined that the CBA requires EIC's and CSA's to lift bags and wheelchair passengers in the course of performing the job, among other items, and that as a result Summerville could not "perform all of the functions of the Customer Service Agent position," as those duties and functions are set out in the CBA and in practice. (App. 3, 57-60). Specifically, the System Board's decision relied on and interpreted CBA Article 4(f) to include "lifting baggage and transferring passengers" as part of a CSA's duties, and it determined that such duties are "outside" of Summerville's restrictions while on overtime, holiday and day-trading shifts. (App. 59.) The System Board further determined that, on such shifts, Summerville would not necessarily be able to work as a Zone Coordinator (in which TWA has been able to accommodate him during his regular shift), but due to staffing limitations Summerville must be available to work as a CSA or EIC in *any* position with "additional or different duties." (App. 3, 58-59.)

Company and IAM witnesses testified at the Board's arbitration hearing that the purpose of the limited duty

policy was to ensure that TWA's operating requirements were met on overtime, holidays and day-trading shifts by requiring that unrestricted CSA's and EIC's are able to carry out the full responsibilities of that position with a smaller staff. (App. 58-59.) Indeed, Summerville agreed that he may be called on to perform *any* EIC or CSA position and function on overtime and holiday shifts.[1]

Summerville filed his Complaint against TWA in the District Court on December 6, 1996, and he filed his First Amended Complaint to add the IAM as a defendant on June 30, 1997. Summerville alleged that TWA and the IAM discriminated against him on the basis of his alleged disability, in violation of the Americans with

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[1] Summerville testified as follows:

Q: Do you understand that that's the rationale of the provisions negotiated by your union and the company that if you are going to show up on an overtime situation or on a holiday, that you could be assigned to any job at the airport within your job classification, customer service agent or EIC,you probably won't be just going to your zone coordinator desk; do you understand that?

A: Yes.

Q: Okay. And the overtime rosters for the CSA's and the EIC's, I think you've already testified to this, there is one overtime roster for all CSA's and all EIC's; am I right?

A: That's correct.

* * *

Q: Would you agree that a [CSA], whether large or small, is supposed to lift to the best of their ability, baggage at the ticket counter, assisting with bags at the gates, passengers, etc.?

A: I would agree that they would have to lift baggage or be able to lift baggage.

(TWA App. 3-4.)

Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* (App. 21.) Prior to trial, the District Court held a hearing at which Summerville's motion in limine to exclude any reference at trial to the System Board arbitration was considered. (App. 9.) After extensive argument and briefing, the District Court found that while the System Board's factual findings were not dispositive of any issue in this case — including whether lifting was required of EICs and CSAs on overtime, holiday and day-trading shifts — the Court denied Summerville's motion in limine on the evidentiary issue. (App. 12-13.) The Court initially ruled that the Board's determination could be offered in evidence. (App. 13.) Subsequently, during trial, the District Court reversed course and granted Summerville's motion in limine to exclude any reference to the System Board's determination, which had not yet been introduced. (App. 14-20.)

At the close of Summerville's evidence, and again at the close of all evidence, TWA moved for judgment as a matter of law, which was denied. A verdict was rendered on November 3, 1998. (App. 22.) The jury found in favor of Summerville on his disability discrimination claim, awarding Summerville $175,000 in compensatory damages. (App. 22.)

On November 18, 1998, TWA renewed its motion for judgment as a matter of law or, in the alternative, for new trial or remittitur. (App. 22.) Summerville also filed his motion for equitable and injunctive relief on that date. (App. 43.) The District Court denied TWA's motions on June 11, 1999 and, on June 17, 1999, the District Court granted Summerville's motion for equitable and injunctive relief, awarding Summerville $39,081.06 in back pay, plus post-judgment interest,

and enjoining TWA from prohibiting Summerville from the same opportunity to work overtime and holiday hours and to day trade as given to other employees. (App. 40, 42, 49-50.)

On August 7, 2000, following oral argument, the United States Court of Appeals for the Eighth Circuit reversed the District Court's order denying TWA's motion for judgment as a matter of law on Summerville's ADA claim, finding that issue preclusion barred Summerville from contesting the System Board's factual findings on his job requirements. (App. 1-7.) The Eighth Circuit then entered judgment as a matter of law for TWA on Summerville's disability discrimination claim because the Court found he could not perform the essential functions of his job on overtime, holiday and day-trading shifts with or without accommodation. (App. 1-7.) Summerville's petition for rehearing and rehearing *en banc* was denied on October 26, 2000. (App. 51.)

REASONS FOR DENYING THE WRIT

A. Introduction

The Eighth Circuit Court of Appeals did not err when it granted judgment as a matter of law for TWA on Summerville's disability discrimination claim. Moreover, this is not a decision that is worthy of review by the Supreme Court. *See* Sup. Ct. R. 10(c). This is an intensively fact-driven decision which, due to the unusual nature of the facts and the claims at issue, does not have broad applicability. Moreover, contrary to Summerville's contention, this is not a case about complete preemption of ADA or other civil rights claims by the RLA. There is no conflict between this decision by a unanimous Eighth Circuit Court of Appeals panel,

which was upheld on a petition for rehearing and rehearing *en banc*, and the decisions of any other circuits. See Sup. Ct. R. 10(a). Finding in favor of TWA as a matter of law is entirely consistent with the language and purposes of the RLA, the ADA, and with established precedent. Respondent TWA respectfully requests the Court to deny Summerville's Petition for Writ of Certiorari.

The Eighth Circuit held that the System Board's final and binding factual determinations on a discrete issue precluded Summerville from arguing about his job requirements for overtime, holiday and day-trading shifts. Under the RLA, the factual findings made by the Board to resolve Summerville's grievance were within its exclusive statutory jurisdiction. Because the System Board determined that the functions of a CSA and an EIC necessarily include "lifting baggage and transferring passengers," and that Summerville must be able to perform those functions on overtime, holidays and day-trading, the courts must defer to these findings. On these facts, the System Board's findings are determinative of a material element that Summerville must prove to be successful on his disability discrimination claim under the ADA. Accordingly, the Eighth Circuit properly held that issue preclusion applies to bar Summerville's arguments to the contrary.

Moreover, TWA was entitled to judgment as a matter of law on Summerville's disability discrimination claim because Summerville cannot thereby perform an essential function of his job on overtime, holiday, or day-trading shifts, with or without reasonable accommodation. Lifting is an essential function of the EIC and CSA positions on those shifts. Further, as the System Board found and Summerville conceded, EIC's working over-

time, holiday and day-trading shifts may be assigned to any position or function, without regard to seniority. Because lifting is required on those shifts, and Summerville cannot perform essential functions of his job even with accommodation, judgment as a matter of law was appropriate. The Petition for Writ of Certiorari should be denied.

B. Issue Preclusion Bars Summerville's ADA Claim On These Facts

Based on the unique facts of this case, issue preclusion bars Summerville from challenging certain facts determined by the System Board in support of his burden to prove a material element of his ADA claim. The System Board has exclusive jurisdiction under the RLA to make the factual determinations that Summerville asked the District Court to ignore. *See* 45 U.S.C. § 184; *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53 (1994); *Brotherhood of Railway Carmen of the U.S. and Canada v. Missouri Pac. R.R. Co.*, 944 F.2d 1422, 1426 (8th Cir. 1991). The Eighth Circuit Court of Appeals properly held that the District Court erred when it refused to apply the doctrine of issue preclusion on the factual issues of whether Summerville is required to lift on overtime, holiday and day-trading shifts and that he must be available to work as a CSA or EIC at any position on such shifts, which was conclusively determined by the System Board. Accordingly, judgment as a matter of law was appropriate.

1. Contractual Disputes Under The RLA

Congress enacted the RLA "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working

conditions." 45 U.S.C. § 151a. To that end, Congress directed carriers to establish System Boards of Adjustment, granting them exclusive jurisdiction to hear and determine all matters that are "minor" disputes — disputes between an employee and a carrier growing out of grievances, or out of the interpretation or application of collective bargaining agreements. 45 U.S.C. § 184; *Hawaiian Airlines, Inc.*, 512 U.S. at 252-53; *Brotherhood of Railway Carmen*, 944 F.2d at 1426; *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 595 (5th Cir. 1993). Minor disputes are to be resolved solely by the airline's System Board to the exclusion of the federal courts. *Bowe v. Northwest Airlines, Inc.*, 974 F.2d 101, 103 (8th Cir. 1992), *cert. denied*, 507 U.S. 992 (1993).

Here, it is without question that Summerville's grievance regarding whether he should be allowed the opportunity to work overtime and holidays and to day trade was a "minor" dispute, and that it required both interpretation and application of the CBA and all the facts and circumstances involved. The grievance was therefore within the *exclusive* jurisdiction of the System Board, which is uniquely qualified to evaluate fact disputes within the context of the CBA, industry practice and the common law of the shop. *See Blakely v. USAirways, Inc.*, 23 F.Supp.2d 560, 566 (W.D.Pa 1998). Moreover, the System Board's findings are final and binding. *International Assoc. of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682, 694 (1963) (Congress intended Board to act as public agency and for its awards to have legal effect). (App. 2, 4, 53-54.)

2. The System Board's Conclusive Determination

When Summerville was restricted by his doctor from lifting following his accident, TWA placed Summerville on limited duty to accommodate him on his regular shift as a gate EIC. Subsequently, Summerville was given the Zone Coordinator EIC position, which does not require any lifting. In other words, TWA placed Summerville in a full-time position in which he does not have to lift. He chose not to bid into a another job that did not require lifting. The CBA, however, provides that employees on limited duty may not work overtime or holiday shifts, or day-trade, because these shifts are staffed with far fewer employees and require that employees may be assigned to work *any* CSA or EIC position, including the ticket counter, the duties of which Summerville *admits* require lifting.

After TWA accommodated Summerville, he grieved TWA's decision that he could not work overtime and holiday shifts or day trade as an EIC or CSA. After hearing all of the evidence and the parties' witnesses, the System Board denied Summerville's grievance. The Board found that Summerville could not "perform all of the functions of the [CSA]," as those functions are set out in the CBA and in practice. Specifically, the System Board's decision relies on and interprets Article 4(f) to include "lifting baggage and transferring passengers" in a CSA's duties, and it determined that such duties were outside of Summerville's lifting restriction. The System Board further determined that, even as an EIC, Summerville must be able to perform all of the functions of a CSA on overtime, holiday and day-trading shifts.

3. The System Board Findings' Effect on Summerville's ADA Claim

Summerville contends that TWA violated the ADA when it followed the terms of the CBA, not allowing him to work overtime and holidays or to day trade while on limited duty. Despite the System Board's findings, as well as his own admissions, Summerville argued both before the Board and at trial that lifting was not required on overtime and holidays, and while day-trading, and that he did not have to be available to perform CSA functions on those shifts; thus, Summerville alleged, TWA discriminated against him by refusing to allow him to work those shifts. Summerville continues to mislead here by relying solely on the limited duties he performs on his regular shift as a Zone Coordinator EIC, in which he has been accommodated by TWA so as not to include lifting, and ignoring the findings made by the System Board, pursuant to the grievance process he requested.

Because the System Board conclusively determined that the functions of a CSA and EIC during overtime, holiday and day-trading shifts involve "lifting baggage and transferring passengers," and that Summerville must be available to perform any CSA function on such shifts, he is barred from arguing to the contrary and the District Court is without jurisdiction under the RLA to make its own fact determination, or to allow the jury to do so. On these facts, it was contrary to the RLA statutory scheme created by Congress for the jury to make its own determination of job functions on such shifts based on Summerville's proffered "evidence." Indeed, the District Court's ruling, which was properly reversed by the Eighth Circuit, undermined the exclu-

sive jurisdiction of the System Board. *See Hawaiian Airlines*, 512 U.S. at 253 (citing 45 U.S.C. § 184.)

After interpreting the contract as well as all facts and circumstances at issue, the System Board applied its interpretation to the question before it, finding that Summerville could not "perform all of the functions of the CSA position" on overtime, holiday and day-trading shifts. Summerville's proof at trial, which was permitted by the District Court despite the System Board's determination to the contrary, consisted of an effort to show that he was *not* required to lift and that his lifting restriction did *not* prevent him from performing the essential functions of his position and, thus, that he should be permitted to work overtime and holidays and to day trade. After hearing the evidence, the System Board found within its exclusive jurisdiction that Summerville was wrong. Those findings were binding on Summerville.

The Eight Circuit correctly applied the doctrine of issue preclusion in this matter. (App. 4.) The Court of Appeals found that:

> the traditional elements of issue preclusion are present because these fact issues are identical in both the System Board case and the present case; these fact issues were actually litigated before the System Board; resolution of these fact issues was necessary and essential to the judgment of the System Board; and the System Board's decision was a final, valid judgment.

(App. 4.) (citing *Haley v. Retsinas*, 138 F.3d 1245, 1248 (8th Cir. 1998)); *see also Pryner v. Tractor Supply Co.*, 109 F.3d 354, 361 (7th Cir. 1997); *Benjamin v. Traffic Exec. Assoc. Eastern Railroads*, 869 F.2d 107, 110 (2nd

Cir. 1989). Thus, because of the System Board's conclusive factual findings, the Court of Appeals held Summerville was barred by issue preclusion from arguing about the job requirements for his overtime, holiday and day-trading employment. *See, e.g., Alexander v. Pathfinder, Inc.*, 91 F.3d 59, 62-63 (8th Cir. 1996) (hearing officer's *fact finding* determination barred plaintiff's ADA and Rehabilitation Act claims), *on remand*, 1999 WL 673226 (August 31, 1999).

This is not to say that the RLA broadly preempts all ADA claims as a matter of law. The law of this Court is that it does not, and TWA has never suggested here that the RLA precludes Summerville from asserting an ADA claim.[2] Rather, TWA asserts that, on these unique facts, issue preclusion applies to bar Summerville from arguing contrary to the determination of the System Board, which was made within its exclusive jurisdiction at his request. Thus, as to the specific issues of fact whether Summerville is required to lift on overtime, holiday and day-trading shifts, and whether he must be available to perform any job function on such shifts, issue preclusion bars Summerville in this action from revisiting the prior determination. The remaining question, addressed below, is how that determination ultimately effects Summerville's ADA claim.

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[2] The District Court failed to address TWA's argument of issue preclusion in its Order denying JAML. Throughout trial, the District Court seemingly confused TWA's contention that issue preclusion applied to the specific factual issue whether lifting was required on the special shifts Summerville wanted to work, with complete preemption of Summerville's ADA claim as a matter of law, which TWA never argued. Similarly, the District Court granted plaintiff equitable relief after summarily dismissing TWA's arguments that the System Board's decision was preclusive on the fact issue that lifting was required on certain shifts.

Summerville erroneously contends that this Court's decision in *McDonald v. City of West Branch*, 466 U.S. 284 (1984), is controlling on the question whether issue preclusion bars Summerville's ADA claim. Summerville's argument misses the mark. He claims *McDonald* provides that an arbitration award may never have collateral estoppel effect on a discrete issue in a civil rights action. Despite Summerville's meritless argument that *McDonald* is both factually and legally "virtually identical" to his own dispute, *McDonald* is clearly distinguishable.

The concerns expressed by the Court in *McDonald* over the alleged infirmities of arbitral fact finding, on to which Summerville grasps in his Petition, have been recently repudiated by this Court.[3] *See Circuit City Stores, Inc. v. Adams*, — U.S. —, 2001 WL 273205 at *15-16 (March 21, 2001) (*citing Gilmer v. Interstate/*

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[3] Summerville contends that this Court, in *McDonald* and *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), among other cases, has taken the position that "arbitral fact finding is generally not equivalent to judicial fact finding," and that arbitration is patently unreliable to resolve disputes in civil rights actions. (Pet. Brief at 14-17.) However, Summerville severely mischaracterizes the current state of the law. *See Circuit City Stores, Inc. v. Adams*, — U.S. —, 2001 WL 273205 (March 21, 2001). Such reasoning embodies what this Court has termed "the old judicial hostility to arbitration," *see Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480 (1989), which the Supreme Court has overwhelmingly repudiated. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court eschewed the view expressed in those earlier cases that "arbitration was inferior to the judicial process for resolving statutory claims, noting that 'mistrust of the arbitral process ... has been undermined by our recent arbitration decisions.'" *Id.* at 34 n.5. Indeed, in *Gilmer*, this Court expressly upheld a contractual agreement to arbitrate as the exclusive remedy for the employee's ADEA claim.

Johnson Lane Corp., 500 U.S. 20, 30-32 (1991)). Further, *McDonald* did not concern a System Board arbitration pursuant to the strict statutory framework of dispute resolution established by the RLA. Finally, in *McDonald*, this Court considered whether a prior non-RLA arbitration award had a *res judicata* or complete preclusive effect on the Petitioner's Section 1983 action; not whether specific factual findings of a System Board, acting within its exclusive statutory jurisdiction under the RLA, were dispositive of an ADA claim in that particular case because the same operative facts were required to be proven as a material element of the claim. *See McDonald*, 466 U.S. at 287 n.5 (Court used term "collateral estoppel" for "convenience" to be consistent with opinion below, but distinguished meaning from that of "res judicata," which was applicable therein). Thus, this Court's decision in *McDonald* is distinguishable on the facts of Summerville's case.

As this Court noted in *McDonald*, issue preclusion is distinct from res judicata or complete preemption. *See id.* Based on the System Board determination, there can be no factual dispute as to whether the required duties of a CSA or EIC include lifting baggage and transporting passengers on overtime, holiday, and day-trading shifts. Nor can there be any factual dispute as to whether Summerville could perform the duties of a CSA or EIC on overtime, holidays and day-trading. These issues have been determined by Summerville's own invocation of the System Board process. The System Board interpreted the terms of the CBA and the facts and circumstances involved, and it made a conclu-

sive determination to which both Summerville, as a member of the IAM, and TWA, are bound under the RLA.[4]

Thus, because resolution of these factual issues was dispositive of Summerville's disability discrimination claim, there was no question of fact remaining for the jury. The Court should have concluded as a matter of law, based on the System Board determination, that Summerville was precluded from arguing that lifting was not an essential function of an EIC or CSA on overtime, holidays, and day-trading shifts. The Court is not permitted to make its own determination as to what the contractual functions and duties of a CSA are on such shifts. The Court likewise is without jurisdiction to permanently enjoin TWA to disregard the binding

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[4] Summerville contends that the only issue before the jury was whether TWA had discriminated against him under the ADA, and that this particular issue was not ever before the System Board. While the Board was not asked to specifically decide "discrimination," the same fact question – whether lifting is required of a CSA or EIC on overtime, holidays and while day trading – was presented to both forums. Indeed, Summerville agrees that the "main" issue in his ADA claim was for him to prove that lifting was not required on such shifts, or his claim would fail. The System Board was asked for its interpretation and application on that fact issue before trial, a role it must play exclusively under the RLA. Despite this long-standing precedent, Summerville argues that the System Board "overstepped its bounds" when it denied his grievance. (Pet. Brief at 9.) Once the Board completed its statutory duty, Summerville was bound by that determination, as was TWA. He cannot argue to the contrary in the District Court or pretend that the Board's opinion means nothing. (App. 3.)

Moreover, Summerville could have sought review of the System Board determination by moving to vacate in the District Court, but he chose not to do so. (*See* 45 U.S.C. § 153 First (q).) Indeed, Summerville sought no review at all, and now he wants to pretend that the Board made no findings.

determination of the System Board by taking contrary action. Indeed, to do so violates the RLA and creates a situation where Summerville is the only IAM-represented employee "exempted" from the requirements of the CBA. Issue preclusion binds Summerville under these facts, as the Eighth Circuit properly held.

C. Lifting is an Essential Function of Summerville's Job on Overtime, Holiday and Day-Trading Shifts

The ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). To prove disability discrimination in violation of the ADA, Summerville bears the burden to show that he can perform the essential functions of the employment he seeks. *See Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995). Summerville could not meet his burden of proof and, thus, TWA was entitled to judgment as a matter of law.

There is no dispute that Summerville can perform the essential functions of his job as Zone Coordinator EIC on his regular shift, as he has been accommodated to do so by TWA. That is not the issue here. In this lawsuit, Summerville seeks to work overtime and holiday shifts, and to day-trade, as an EIC, when job requirements are different. Thus, what Summerville may or may not have to do on his regular shift is not relevant to a discussion of essential functions here. On overtime, holiday and day-trading shifts, when staffing levels are reduced, the CBA imposes different standards. Accordingly, all IAM represented employees are prohibited from working overtime and holidays and from day trading while on limited duty.

The ADA defines "essential functions" to encompass those "*fundamental*" duties required by the position in question, excluding "marginal" functions. 29 C.F.R. § 1630.2(n)(1). Moreover, the employer has the right to determine those fundamental duties. *See Nesser v. TWA*, 160 F.3d 442, 445-46 (8th Cir. 1998) (*citing* 42 U.S.C. § 12111(8).) The Eighth Circuit has recognized that much of the information used to determine essential functions "lies uniquely with the employer" under the ADA and its regulations. *See Benson*, 62 F.3d at 1113.

The ADA regulations provide that "[a] job function may be considered essential for *any* of several reasons, including but not limited to the following: ... (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed." 29 C.F.R. § 1630.2(n)(2)(ii). Further, the regulations provide that: e*vidence* of whether a particular function is essential *includes*, but is not limited to: *(i) the employer's judgment* as to which functions are essential; (ii) "written *job descriptions*"; (iii) the amount of time spent on the job performing the function; (iv) the "consequences of not requiring the incumbent to perform the function"; (v) the "*terms of a collective bargaining agreement*"; and (vi) "work experience" of employees in similar jobs. *See* 29 C.F.R. § 1630.2(n)(3) (emphases added).

Contrary to Summerville's contentions, the Eighth Circuit did not "ignore" these factors, or base its decision on TWA's "views" alone. (*See* Pet. Brief at 13.) Rather, the Court of Appeals reviewed the District Court's decision "on the essential function issue de novo," in light of the applicable ADA regulations and the facts, and in accordance with the appropriate standard of

review.[5] The Court agreed with TWA after such consideration, finding as a matter of law that lifting is an essential function of any CSA or EIC position on overtime, holiday and day-trading shifts. (App. 5-6.).

Lifting is an essential function of Summerville's job on such shifts according to the CBA, the written job description, and the employer's judgment, which is given deference under the ADA and, moreover, is in accordance with the System Board's findings. *See Nesser*, 160 F.3d at 445-46; *Moritz v. Frontier Airlines, Inc.*, 147 F.3d 784, 787 (8th Cir. 1998). The CSA and EIC positions specifically require employees to perform "checking-in passengers and baggage; insuring the expeditious flow of passengers through the terminal and gate areas; and performing passenger boarding functions." Additionally, the consequences of not requiring employees to lift on such shifts in light of staffing limitations would greatly impair the airline's ability to operate.[6] Accordingly, based on its consideration of

[5] Contrary to Summerville's assertion, the standard of review used by the Eighth Circuit Court of Appeals below, citing *Douglas County Bank & Trust Co. v. United Fin. Inc.*, 207 F.3d 473, 477 (8th Cir. 2000), (*see* App. 5), was in accordance with the standard of review on a motion for judgment as a matter of law enunciated by this Court in *Reeves v. Sanderson Plumbing Prod., Inc.*, 147 L.Ed.2d 105, 122-23 (2000).

[6] Indeed, Summerville's forty (40) pound lifting restriction would preclude him from handling most baggage that is checked should he be assigned to the ticket counter while on overtime, holiday and day-trading shifts. Even one seventy (70) pound bag sitting at the ticket counter or a wheelchair bound passenger at the gate who cannot be boarded due to an employee's inability to lift may delay an entire flight. Like the desk police officer in *Champ v. Baltimore County*, 884 F.Supp. 991 (D.Md. 1995), who could not fire a gun but had to be able to do so when necessary as a police officer, there can be no question that lifting is an essential function of a CSA/EIC's job on such shifts, when staffing levels are reduced. (App. 6.)

these factors and following its prior decision in *Moritz*, the Eighth Circuit held as a matter of law that lifting is an essential function of Summerville's overtime, holiday and day-trading employment.[7] (App. 6.)

The only remaining issue for the Court of Appeals concerned whether Summerville demonstrated that he could perform the essential functions of the EIC or CSA position on overtime, holidays, and day-trading shifts with or without reasonable accommodation, regardless whether he can perform such functions on his regular shift. The Court found, however, that Summerville could be assigned on those shifts to any CSA or EIC position (App. 6), which may include the ticket counter (where lifting is required without question). Moreover, in accordance with the System Board's findings, Summerville admitted that he is not assured the Zone Coordinator position on those shifts, and he further acknowledged that he cannot perform all of the essential functions of the EIC or CSA positions on overtime and holidays because he admits that he is required to lift on such shifts. (TWA App. 3-4.)

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[7] Summerville contends that the Court of Appeals erred because the District Court found "ample" evidence at trial to support Summerville's claim that lifting was *not* an essential function of his job. Summerville's argument misses the mark, again. Only the System Board has the authority to determine what is required when there is a contractual dispute submitted to it, which Summerville in fact did. Now, having lost his grievance, Summerville would like to ignore the findings and try to convince a federal court of what the Board already rejected. As Summerville acknowledges in his Brief (Pet. Brief at 15), however, he alone chose not to appeal the System Board determination. Summerville is precluded from challenging or disregarding those findings.

The Court of Appeals, therefore, held that Summerville must be able to perform all of the functions of an EIC or CSA on overtime and holidays, due to a reduced workforce, regardless what his job on the regular shift may be. The ADA regulations recognize, as does Summerville in his Petition (Pet. Brief at 19 n. 5), that a "function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed." 29 C.F.R. § 1630.2(n)(2)(ii); *see Moritz*, 147 F.3d at 787. Accordingly, judgment as a matter of law in favor of TWA was properly granted by the Eighth Circuit because Summerville cannot perform the essential functions of his job on overtime, holiday and day-trading shifts with or without accommodation.

CONCLUSION AND PRAYER FOR RELIEF

The Eighth Circuit Court of Appeals' grant of Judgment as a matter of law in favor of TWA on Summerville's claim of disability discrimination under the ADA was proper. This is not a decision that is worthy of review by the Supreme Court. This is a fact-driven decision which, due to the unusual nature of the facts, does not have broad applicability. There is no conflict between this decision, rendered by a unanimous Eighth Circuit panel based on the law of that Circuit, and the decisions of any other circuits or a decision of this Court. *See* Sup. Ct. R. 10(a). A finding in favor of TWA in this matter is entirely consistent with longstanding Railway Labor Act precedent and with established Eighth Circuit precedent. Respondent TWA respectfully requests the Court to deny Summerville's Petition for a Writ of Certiorari.

Respectfully submitted,
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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

KENNETH SUMMERVILLE,
Plaintiff,

v.

TRANSWORLD AIRLINES, INC.,

Defendant.

No. 4:96CV2379-MLM

JURY TRIAL

BEFORE THE HONORABLE MARY ANN L. MEDLER
UNITED STATES MAGISTRATE

VOLUME III

OCTOBER 28, 1998

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(KEYWORD SEARCH FOR EXHIBITS AT END OF TRANSCRIPT)

you're restricted. You can't work holidays. The company said you can't work holidays and you can't work overtime; isn't that right?

A. Yes.

Q. All right. If you worked on the holiday or you worked overtime, you could be called on to do any of the functions of a CSA or a EIC, you could be called on to work the ticket counter, you could be called on to work a gate, and there could be a skeleton crew on a holiday where it's not very busy; isn't that correct?

A. Very unlikely here in St. Louis, but yes, I agree it could be I could be called on.

Q. And do you understand that that's the rationale behind the rule negotiated between your union and the company that people working overtime and holidays have to be able to perform all the functions of their job classification?

MS. DECK: Objection, Your Honor. Calls for speculation and the document speaks for itself.

THE COURT: Overruled.

THE WITNESS: Re-ask the question. I'm sorry.
BY MR. BAUER:

Q. Do you understand that that's the rationale of the provisions negotiated by your union and the company that if you are going to show up on an overtime situation or on a holiday, that you could be assigned to any job at the airport within your job classification, customer service agent or EIC, you probably won't be just going to your zone coordinator desk; do you understand that?

A. Yes.

Q. Okay.

Q. And the overtime rosters for the CSAs and the EICs, I think you've already testified to this, there is one overtime roster for all CSAs and all EICs; am I right?

A. That's correct.

Q. You talked about, I forget exactly how you characterized it, some customer service agents are not physically large and they obviously would be able to lift less than say a large person; do you remember that?

A. Yes.

Q. Would you agree the customer service agents within the perimeters of how big or how small they are, that part of their job is lifting to the best of their ability?

A. Restate your question, please.

Q. Would you agree that a customer service agent, whether large or small, is supposed to lift to the best of their ability, baggage at the ticket counter, assisting with bags at the gates, passengers, etc.?

A. I would agree that they would have to lift baggage or be able to lift baggage. In reference to wheelchairs, they can volunteer, of if they can't accommodate, then we try to find somebody else that will help out because they can't — because they are so small, they can't lift a person two hundred pounds.

Q. You know this whole volunteer thing on wheelchair passengers confuses me, and the reason it does is that in your January 1998 deposition in connection with your auto accident you testified that your job requires you to assist with wheelchair passengers. Now, which way is it?